Bad Judges

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In jurisdictions across the country, complaints are heard about judges and magistrates who are incompetent, self-indulgent, abusive, or corrupt.[2] These bad judges terrorize courtrooms, impair the functioning of the legal system, and undermine public confidence in the law. They should not be allowed in office. Yet many retain prestigious positions even after their shortcomings are brought to light. The situation, moreover, does not appear to be under control. If recent scandals in New York[3] and other states[4] are a guide, incidents of judicial misconduct may be on the rise [5]

The problem of bad judges is embedded in broader considerations about the optimal design of the judiciary in American political culture. The basic tradeoff is between independence, accountability and quality. To preserve independence it is necessary to insulate judges from external controls over their behavior. If judges are protected from external controls, however, they have fewer incentives to provide quality services. To ensure accountability judges must be subject to democratic processes. But influence and patronage, enemies of good judging, are inevitable when judges are chosen

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[2] For general treatments, *see* Max Boot, Out of Order: Arrogance, Corruption and Incompetence on the Bench (1999) (focusing especially on problems of ideologically biased judges); Cynthia Gray, A Study of State Judicial Discipline Sanctions, State Judicial Institute and American Judicature Society (2002) (looking specifically at the question of sanctions for proven misconduct).

[3] *See* text accompanying notes __, *infra.*

[4] *See* text accompanying notes __, *infra.*

[5] *See, e.g.*, Max Boot, Out of Order: Arrogance, Corruption and Incompetence on the Bench (1999); James Bradshaw, Ohio Chief Justice Wants Judges, Lawyers to Clean up Their Act, Columbus Dispatch, September 28, 1999, available at 1999 WL 27421994 (incidence and severity of judicial misconduct have been increasing).

by political means. The challenge is to select, retain, supervise and remove judges in such as way as to maintain independence and accountability while not unduly sacrificing quality.[6]

The policy space is already populated with approaches to this challenge. Several of these ideas make eminent sense. However, the common element of most is that they rely on public processes.[7] This paper explores a different reform, not inconsistent with governmental responses, but based principally on the actions of private parties. The idea has two parts. First, litigants would be presented with a randomly selected panel of trial judges and permitted as of right to exclude one or more in such a way that the judges being excluded are shielded from knowledge about the litigants' choices.[8] Second, statistics on exclusion rates would be compiled and used to aid in the process of retention, supervision and removal.

This paper is structured as follows. Part I describes activities that mark a jurist as a bad judge. Part II addresses the fundamental policy tradeoff. Part III discusses existing approaches to the problem. Part IV sets forth and analyzes the judicial exclusion proposal.

I. Bad Judges: Types and Examples

Ideally, the mix of public policies employed to combat bad judges should take account of the full range of activities thatimpair the quality of justice in America 's

[6] Independence, accountability and quality are themselves instrumental in the basic design problem for republican government, namely how to minimize the sum of the costs of governmental and private violence, expropriation and abuse. *See* Geoffrey P. Miller, Rights and Structure in Constitutional Theory, 8 Social Philosophy & Policy 196 (1991) (identifying this optimization problem as the fundamental challenge of a republican form of government).

[7] The most salient exception that relies on private initiative, peremptory challenges of judges, is discussed at text accompanying notes __ - __ *infra*.

courtrooms.[9] It turns out that most examples of bad judging can be grouped into the following categories: (1) corrupt influence on judicial action; (2) questionable fiduciary appointments; (3) abuse ofoffice for personal gain; (4) incompetence and neglect of duties; (5) overstepping of authority; (6) interpersonal abuse; (7) bias, prejudice and insensitivity; (8) personal misconduct reflecting adversely on fitness for office; (9) conflict of interest; (10) inappropriate behavior in a judicial capacity; (11) lack of candor; and (12) electioneering and purchase of office.[10]

Corrupt Influence on Judicial Action. Most famously, bad judges corrupt the administration of justice. They tip suspects about search warrants,[11] hinder execution of arrest warrants,[12] block charges[13] and reduce bail [14] They overlook requirements for

[8] As discussed below, the idea is similar to procedures used in some contexts to select arbitrators, and also has a relationship to rights of peremptory challenge of judges that already exist in some states. *See* text accompanying notes __, ___ *infra*.

[9] In addition to decisions by state and federal courts, information on bad judges can be obtained from state judicial disciplinary commissions, newspapers, and scholarly books and papers. The discussion that follows draws on all of these sources.

[10] These categories overlap in some respects the definitions contained in state codes of judicial ethics, nearly all of which are based on the ABA's Model Code of Judicial Conduct (1990). The categories used here they appear to provide a useful means for analyzing judicial misconduct along functional lines.

[11] *See, e.g., In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Kenneth W. Gbbons , a Justice of the Glenville Town Court, Schenectady County*, New York State Commission on Judicial Conduct, February 6, 2002, available at http://www.scjc.state.ny.us/Determinations/G/gibbons.htm (judge alerted an attorney that he had signed a warrant to search client's premises).

[12] *See, e.g.*, *In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Thomas S. Kolbert, a Justice of the Cheektowaga Town Court, Erie County*, New York State Commission on Judicial Conduct, December 26, 2002, available at http://www.scjc.state.ny.us/Determinations/K/kolbert.htm (as a favor to a friend, judge attempted to dissuade police from executing an arrest warrant).

[13] *See, e.g.*, Miss. High Court Orders Judge Reprimanded, Baton Rouge Advocate, October 12, 2001, available at 2001 WL 3872539 (judge allegedly prevented police from filing domestic abuse charges against judge's client).

[14] *See, e.g.*, Christopher Tritto, Ex-court Marshal Receives Probation, Community Service, Charleston Gazette & Daily Mail, March 18, 2003, available at 2003 WL 5452448 (magistrate collected money from criminal defendants as a price for releasing them on bond); Richard Marosi, State Agency Admonishes Former Judge, Los Angeles Times, October 4, 2000, available at 2000 WL 25903584 (judge improperly reduced bail for criminal suspects at request of a friend).

changes in legal status,[15] fix parking tickets,[16] dismiss moving violations,[17] "take care" of DUI cases,[18] issue corrupt rulings in civil[19] and criminal[20] matters, and grant special access privileges to lawyers with pending cases.[21] If a matter is not before them, they commandeer it,[22] misappropriate the file,[23] direct the case to a friendly judge[24] or lobby the judge to whom the matter is assigned.[25] They even alter outcomes by tampering with[26] or fabricating[27] official records.

[15] *See* John Greiner, Judges Can Face Ouster from Bench, Daily Oklahoman, December 30, 2002, available at 2002 WL 103885756 (Oklahoma judge pocketed fees for waiving age and blood test requirements for obtaining a marriage license).

[16] *See* San Jose State Agency Investigates Judge's Ethics on Tickets, Los Angeles Times, April 29, 2003, available at 2003 WL 2401698 (judge accused of fixing parking tickets); Wren Propp, Court Suspends Mora Magistrate, Albuquerque Journal, April 10, 2003, available at 2003 WL 18623941 (same); Shannon Lafferty, Danser Defends Handling of DUI Case: New Questions For South Bay Judge Who Tried to Dismiss Parking Tickets, San Francisco Recorder, February 11, 2003 (same).

[17] *See Inquiry Concerning Judge Michael E. Platt*, California Commission on Judicial Performance, August 5, 2002, available at http://www.cjp.ca.gov/CN%20Removals/Platt%208-5-02.rtf (speeding tickets); *Commission on Judicial Performance v. Gunn*, 614 So.2d 387 (Miss. 1993) (same).

[18] *See Commission on Judicial Performance v. Jones*, 735 So.2d 385 (Miss. 1999) (judge illegally reduced DUI charge to disorderly conduct); John Sullivan, Durham Judge's Censure Sought, Raleigh News & Observer, January 12, 2000, available at 2000 WL 3909876 (judge disposed of DUI case in a back hallway of the courthouse).

[19] *See In the Matter of James Funke, Jr.*, 757 N.E.2d 1013 (Ind. 2001) (judge issued protective orders in favor of relatives challenging decision of water and sewer district); A Judge Judged: Jaffe's Plea Shouldn't Be The End of the Story, Pittsburgh Post-Gazette, February 13, 2003, available at 2003 WL 3888717 (judge extorted $13,000 from a lawyer with a promise of favorable treatment).

[20] *See, e.g.*, *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995), cert. denied, 519 U.S. 927 (1996) (judge took bribe to acquit mob hit man in murder case); John Caniglia, Probe Drags Mahoning Courts to a New Low, Cleveland Plain Dealer, October 18, 2000, available at 2000 WL 5171084 (judge took a $500 bribe to fix a criminal case); *In re Honorable Phil Shoffner*, Arkansas Judicial Discipline & Disability Commission, November 19, 2002, available at http://www.state.ar.us/jddc/pdf/112102_shoffner.pdf (judge heard his own son's criminal case); *In the Matter of Skinner*, 690 N.W.2d 484 (N.Y. 1997) (judge summarily dismissed criminal case against a friend).

[21] *See* A Judge Judged: Jaffe's Plea Shouldn't Be The End of the Story, Pittsburgh Post-Gazette, February 13, 2003, available at 2003 WL 3888717 (judge promised special access to attorneys in exchange for bribe).

[22] *See, e.g., In re Joseph A. Condon*, No. 77 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge non-suited traffic tickets that were not assigned to him).

[23] Carri Geer Thevenot, Judicial Commission: Complaint Resolved by Apology, Las Vegas Review-Journal, February 24, 2002, available at 2002 WL 6871391 (judge kept the court file of his own child's case).

[24] *See* Brian Anderson, Hyde Misconduct Hearing Ends, Contra Costa Times, March 28, 2003, available at 2003 WL 17139683 (judge helped obtain a favorable judge for his daughter's case).

[25] *See, e.g., In re Honorable Frances-Ann Fine*, No. 9501-222, Nevada Commission on Judicial Discipline, October 1998, available at http://www.judicial.state.nv.us/finefindings98.htm (judge spoke with fellow judges about a divorce case in which the judge had an interest and, while attending hearing as a spectator, made faces in an attempt to influence the outcome); *Commission on Judicial Performance v.*

Bad judges get various rewards for influencing cases: goods,[28] sex,[29] debt relief,[30] cash,[31] or the satisfaction of helping out family,[32] friends,[33] lovers,[34] employees,[35] elected

Chinn, 611 So.2d 849 (Miss. 1992) (judge asked a fellow judge to give "consideration" to particular defendants); *Inquiry Concerning Judge Michael E. Platt*, California Commission on Judicial Performance, August 5, 2002, available at http://www.cjp.ca.gov/CN%20Removals/Platt%208-5-02.rtf (judge intervened in friend's daughter's theft case); *In re Honorable John Schatz, Jr.*, California Commission on Judicial Performance, December 15, 1989, available at http://www.cjp.ca.gov/PubReprovals/Schatz_PubR_121589.doc (judge intervened in son's drug case); *In re Judge Glenda K. Doan*, California Commission on Judicial Performance, August 13, 1990, available at http://www.cjp.ca.gov/PubReprovals/Doan_Pubr_081390.doc (as a favor to a friend, judge called another judge and probation department officials to recommend release of criminal suspect); *In re Harry R. Buoscio and Paul Sheridan*, No. 97 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge discussed an overweight truck citation with judge to whom case had been assigned).

[26] *See Inquiry Concerning Johnson*, 692 So. 2d 168 (Florida 1997) (judge backdated DUI convictions); Brendan Smith, Some Judges Run Afoul of the Law, Albuquerque Journal, February 10, 2002, available at 2002 WL 12685479 (judge altered city manager's name, birth date and social security number on court records to cover up a drunk driving arrest).

[27] *See In the Matter of Joseph G. Edwards*, 694 N.E.2d 701 (Ind. 1998) (judge created false divorce decree).

[28] Brendan Smith, Cases Cover a Wide Range, Albuquerque Journal, February 11, 2002, available at 2002 WL 12685560 (magistrate resolved a complaint against a trucker for an overweight load by taking 100 pounds of timber for personal use).

[29] *See In the Matter of Edwards*, 694 N.W.2d 701 (Indiana 1998) (judge presided over or attempted to influence cases involving parties with whom judge was having sexual relations); Brendan Smith, Espanola Group's Deposits Queried, Albuquerque Journal, September 27, 2003, available at 2002 WL 100703036 (judge pressured a female defendant for a date); Brendan Smith, Some Judges Run Afoul of the Law, Albuquerque Journal, February 10, 2002 (judge asked criminal defendant and domestic abuse victim for dates); David Rosenzweig, Former Judge Sentenced for Sex With Defendant, Los Angeles Times, February 1, 2001, available at 2001 WL 2457658 (judge had affair with wife of a criminal defendant awaiting sentencing before him).

[30] *See Inquiry Concerning Judge Michael E. Platt*, California Commission on Judicial Performance, No. 162, August 5, 2002, available at http://www.cjp.ca.gov/CN%20Removals/Platt%208-5-02.rtf (judge fixed a ticket at the request of the wife of a man to whom the judge had owed money).

[31] *E.g.*, Tom Perrotta, Trouble in Brooklyn Spurs Court Reforms: Oversight Added for Matrimonial Matters, New York Law Journal, April 28, 2003 (judge solicited $100,000 in bribes); Robert Becker, Convicted Judge Seeks $113,222: Shields Contends State Owes Pension Payout, Chicago Tribune, April 26, 2000, at 1, available at 2000 WL 3659810 (judge found guilty of taking $6,000 in bribes); Mark Gillispie, 3 More Officials Face Charges: Corruption of Judiciary Probe Continues, Cleveland Plain Dealer, October 26, 1999, at 3B, available at 1999 WL 2388782 (attorney pleaded guilty to paying bribes to judges).

[32] *See In the Matter of James Funke*, Jr., 757 N.E.2d 1013 (Ind. 2001) (father, aunt and cousin); Brian Anderson, Hyde Misconduct Hearing Ends, Contra Costa Times, March 28, 2003, available at 2003 WL 17139683 (daughter); Court Reprimands Judge Robert Brown, Florida Bar News, November 1, 1999 (son).

[33] *See Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (friend); *In the Matter of Skinner*, 91 N.Y.2d 142, 690 N.E.2d 484, 667 N.Y.S.2d 675 (1997)(friend); Brian Anderson, Hyde Misconduct Hearing Ends, Contra Costa Times, March 28, 2003, available at 2003 WL 17139683 (friend's daughter); Richard Marosi, State Agency Admonishes Former Judge, Los Angeles Times, October 4, 2000, available at 2000 WL 25903584 (friend and friend's daughter); *Inquiry Concerning Former Judge Arthur S. Block*, December 9, 2002, available at http://cjp.ca.gov/CNCensureRTF/Block%20Decision%2012-09-02.rtf. (friend's daughter).

officials[36] and colleagues.[37] Judges also accept gratuities. Although gifts may not themselves constitute bribery or extortion, they smack of impropriety when offered by lawyers[38] or litigants.[39]

Judges who corruptly influence outcomes frequently act as sole proprietors. But malfeasance can become systematic. The FBI's Operation Greylord investigation revealed pervasive corruption in Cook County Illinois courts during the 1980s.[40] Fifteen judges and attorneys in the Youngstown Ohio area were convicted of federal crimes between 1997 and 2000.[41] A *Washington Post* exposé published in 2000 detailed pervasive misconduct in the Hillsborough County Florida court system.[42] Most recently,

[34] *In re Jett*, 882 P.2d 426 (Arizona 1994) (judge released paramour from jail).

[35] *See, e.g.*, *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995) (judge presided over felony case against former gardener); *Matter of Ross*, 1990 Ann Rep 153 (New York Commission on Judicial Conduct, Sept 29, 1989) (judge failed to disqualify himself in matters involving business clients, tenant, and personal attorney); *Matter of Barker*, 1999 Ann Rep 77 (New York Commission on Judicial Conduct, March 17, 1998) (judge failed to disqualify himself in a small claims case involving a party who had recently done work for the judge similar to that at issue in the case).

[36] *See In the Matter of Eplin*, 416 S.E.2d 248 (West Virginia 1992) (state senator).

[37] *See, e.g.*, *Public Admonishment of Judge B.J. Bjork*, California Commission on Judicial Performance, n.d., available at http://cjp.ca.gov/PubAdmRTF/BjorkPA_051595.rtf (judge gave lenient treatment to family member of fellow judge at colleague's request).

[38] *See, e.g.*, *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995) (judge received services from lawyer who had won a substantial settlement in a case before him); Paula McMahon, Judge Faces Reprimand for Taking Tickets, Ft. Lauderdale Sun-Sentinel, May 5, 2000, available at 2000 WL 5657245 (baseball tickets).

[39] *See, e.g.*, *In re Daghir*, 657 A.2d 1032 (Pa. Ct. Jud. Disc. 1996) (tickets to college football game); *In re James E. Murphy*, No. 87 CC-5, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (free rental cars); *In the Matter of the Complaint Against Seraphim*, 97 Wis.2d 485, 294 N.W.2d 485 (1980) (gifts from rental car company).

[40] *See, e.g.*, *Bracy v. Gramley*, 520 U.S. 899 (1997) (in petition for habeas corpus relief, party convicted of capital murder held entitled to discovery into potential bias of Cook County trial judge who had himself been convicted of taking bribes from criminal defendants); *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995), cert. denied, 519 U.S. 927 (1996) ("yet another in an unfortunately long line of public corruption cases which have left a blot on the escutcheon of Chicago justice"); Ian Ayres, The Twin Faces of Judicial Corruption: Extortion and Bribery, 74 Denver University Law Review 1231 (1997) (describing author's confrontation with corrupt Cook County judge).

[41] *See* John Caniglia, Probe Drags Mahoning Courts to a New Low, Cleveland Plain Dealer, October 18, 2000, available at 2000 WL 5171084 (several defense attorneys, four municipal court judges, and a former county prosecutor were convicted of various crimes).

[42] *See* Fawn Germer, Intrigue, Investigations Embroil a Courthouse; From Public Defender to Chief Judge, Allegations Seem Epidemic in Florida's Hillsborough County, Washington Post, August 9, 2000, available at 2000 WL 19623310. *See also* Ken Koehn, Courthouse Only Looks Silly, Insiders Maintain,

widespread malfeasance has come to light in Brooklyn New York.[43] One Brooklyn justice was convicted of soliciting bribes and sentenced to prison;[44] another was charged with rigging a divorce.[45] At least fourteen Brooklyn judges have recently faced ethical or criminal investigations,[46] and a district attorney is looking into still more allegations.[47]

Questionable Fiduciary Appointments. A particularlyrich source of benefits for bad judges is the power to appoint friends and allies as criminal defense counsel,[48] court evaluators,[49] guardians,[50] receivers,[51] trustees, mediators,[52] referees,[53] special counsel,[54] or special masters. In Brooklyn New York, party leaders and politically connected law

Tampa Tribune, August 6, 2000, available at 2000 WL 24594017 (presenting insiders' defense of the court system).

[43] *See generally* Alexandra Marks, In Brooklyn, Fixing a 'Corrupt' Court System ; Series of Judicial-Bribery Scandals May Lead to Changes in Way Judges Are Selected, Christian Science Monitor, August 12, 2003, available at 2003 WL 5254871 (describing Brooklyn scandal and analyzing its implications for reform nationwide).

[44] *See* Tom Perrotta, Trouble in Brooklyn Spurs Court Reforms: Oversight Added for Matrimonial Matters, New York Law Journal, April 28, 2003 (Supreme Court Justice Victor I. Barron sentenced to prison for soliciting bribes).

[45] *See* Alexandra Marks, In Brooklyn, Fixing a 'Corrupt' Court System; Series of Judicial-Bribery Scandals May Lead to Changes in Way Judges Are Selected, Christian Science Monitor, August 12, 2003, available at 2003 WL 5254871 (indictment of Judge Garson).

[46] Douglas Feiden, Trial and Error in Queens Courts, New York Daily News July 7, 2003, p.4.

[47] Tom Hays, Corruption Scandal Shakes Brooklyn Court, Associated Press Online, August 4, 2003, available at 2003 WL 60552348 (District Attorney reportedly conducting a grand jury investigation into the relationships between Brooklyn judges, politicians and lawyers).

[48] *See In re Chrzanowski*, 636 N.W.2d 758 (Michigan 2001) (judge appointed her paramour to represent indigent criminal defendants at state expense without disclosing the relationship to opposing counsel).

[49] *See* Report of the Commission on Fiduciary Appointments (December 2001), available at http://www.courts.state.ny.us/fiduciaryreport/fidcommreport.htm.

[50] *See* John Council, E-mail Criticizes Judge's Reprimand as "Unjustified" Texas Lawyer, February 11, 2002 (judge awarded an ad litem appointment in a child custody case to an attorney who had represented the judge in a probate matter).

[51] *See* Voting No on Elected Judges, New York Daily News, December 2, 2001, available at 2001 WL 27989053 (judge appointed the law partner of the county Democratic leader as receiver of a local cemetery.)

[52] *In re Honorable Frances-Ann Fine*, No. 9802-222, Nevada Commission on Judicial Discipline, October 1998, available at http://www.judicial.state.nv.us/finefindings98.htm (judge appointed her cousin as mediator without disclosing the relationship, then threatened to hold the parties in contempt when the mediator was not paid).

[53] *See* Report of the Commission on Fiduciary Appointments (December 2001), available at http://www.courts.state.ny.us/fiduciaryreport/fidcommreport.htm (mentioning referees as type of fiduciary appointment subject to abuse).

firms have received hundreds of such appointments.[55] Brooklyn judges also reward colleagues: one former judge received nearly 250 appointments while another collected $424,000 for a guardianship conferred within three months of leaving office.[56] Judges also use appointments to reward their campaign managers, coordinators, treasurers, and finance committee chairs.[57]

Abuse of Office for Personal Gain. Bad judges misuse their prestige[58] and abuse their contempt,[59] warrant,[60] bail,[61] sentencing,[62] and inherent[63] powers. They do so in order to avoid legal process,[64] punish enemies,[65] pursue political ambitions,[66] conduct

[54] Douglas Feiden, Trial and Error in Queens Courts, New York Daily News, July 7, 2003, at (surrogate judge reportedly appointed a prominent Democrat to the lucrative position of counsel to the public administrator; the appointee then made the Democratic country party boss a partner in his law firm.)

[55] *See* Report of the Commission on Fiduciary Appointments (December 2001), available at http://www.courts.state.ny.us/fiduciaryreport/fidcommreport.htm (providing details of investigation into such appointments).

[56] *See* Report of the Commission on Fiduciary Appointments (December 2001), available at http://www.courts.state.ny.us/fiduciaryreport/fidcommreport.htm.

[57] *See* Report of the Commission on Fiduciary Appointments (December 2001), available at http://www.courts.state.ny.us/fiduciaryreport/fidcommreport.htm.

[58] *See, e.g.*, *Inquiry Concerning Judge D. Ronald Hyde*, California Commission on Judicial Performance, May 14, 1996, available at http://cjp.ca.gov/CNCensureRTF/HydeCNCN_05-14-96.rtf (complaint letters to airlines and book publisher on official letterhead); *Public Admonishment of Judge Charles W. Stoll*, California Commission on Judicial Performance, June 3, 1996, available at http://cjp.ca.gov/PubAdmRTF/StollPA_06-03-96.rtf (letters to collection agency on official letterhead).

[59] *See Inquiry Concerning O'Neal*, 454 S.E.2d 780 (Georgia 1995) (improper use of contempt power); Alaska Commission on Judicial Conduct, Formal Ethics Opinion # 002, available at http://www.ajc.state.ak.us/CONDUCT.htm (judges who abuse the contempt power by jailing without basis or explanation violate code of judicial conduct); Arkansas Judicial Discipline and Disability Commission, *Letter to Honorable Jack Lewis*, Case No. 97-294, July 20, 1998, available at http://www.state.ar.us/jddc/pdf/sanctions/Lewis97.294.PDF (judge inappropriately convicted a person of contempt for posting materials on judge's office door accusing the judge of misconduct).

[60] *See* State Briefs, San Antonio Express-News, June 16, 2000, available at 2000 WL 27526998 (judge signed warrant for arrest of a personal enemy).

[61] State Briefs, San Antonio Express-News, June 16, 2000, available at 2000 WL 27526998 (judge set bail for wrongfully arrested attorney at $690,000).

[62] *See In re William D. Vanderwater*, No. 76 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge sentenced his own former tenant to jail in connection with a personal dispute).

[63] *See, e.g*., *In re William G. Schwartz*, No. 01 CC-3, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge improperly barred individuals from the courtroom); Miss. High Court Orders Judge Reprimanded, Baton Rouge Advocate, October 12, 2001, available at 2001 WL 3872539 (judge who represented a husband in a divorce allegedly used his office to obtain a criminal history of the ex-wife's new husband).

[64] *See, e.g., In re Edwin A. Gausselin*, No. 99 CC-1 Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge informed police that he was a member of the judiciary after

business ventures[67] and run personal errands.[68] One Illinois judge managed to combine many of these misdeeds in a few hours: he "detained a former tenant with the aid of a

being detained for driving under the influence); *In re Cynthia Raccuglia*, No. 99 CC-2 Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (same); *In re John M. Karns, Jr.*, No. 80 CC-4, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge destroyed records of his DUI arrest, thus avoiding prosecution); Debbie Rhyne, Dooly Judge Punished for Striking Deputy, Macon Telegraph, available at 2002 WL 23049756 (judge attempted to use his position to avoid a citation for violating traffic laws); Adriana Colindres, Change Meant to Improve Courts Commission; Amendment Asks Illinois Voters to Add Non-Judge Members to Panel, Peoria Journal Star, available at 1998 WL 5783398 (judge attempted to use his position to avoid citation for violating traffic laws); Linda Kleindienst, Florida Court Orders Reprimand for Judge, Fort Lauderdale Sun-Sentinel, June 2, 2000, available at 2000 WL 22176766 (judge attempted to use his position to avoid a citation for soliciting prostitutes).

[65] *See, e.g.*, *In re William G. Schwartz*, No. 01 CC-3, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge allegedly pressured Southern Illinois University School of Law to admit his stepson, and when the application was denied, retaliated by banning students from the school's clinic from representing clients in his court); *Inquiry Concerning Gallagher*, 951 P.2d 716 (Oregon 1998) (judge used official letterhead in numerous disputes with third parties); William Young, Ousted Town Judge Can't Practice for Three Years, New Jersey Lawyer, February 24, 2003 (judge allegedly demanded that the school district fire a teacher who had gotten into an argument with the judge's son, and, when the district refused to comply, ordered the teacher arrested and presided over his arraignment); Brendan Smith, Cases Cover a Wide Range, Albuquerque Journal, February 11, 2002, available at 2002 WL 12685560 (magistrate ordered the arrest of a former tenant who had damaged the floor of a building he owned, then set the bond so high that the tenant was forced to stay in jail until he agreed to pay for the repairs).

[66] *See In re Peck*, 867 P.2d 853 (Arizona 1994) (judge reinstated charges brought by two allies against his electoral opponent); *In re Hill*, 8 S.W.3d 578 (Missouri 2000) (judge sat on the case of the daughter of a political rival); *In re Randall S. Quindry*, No. 74-CC-1, Illinois Judicial Inquiry Commission, available at http://www.state.il.us/jib/summary.htm (judge attempted to alter absentee ballots); *Inquiry Concerning O'Neal*, 454 S.E.2d 780 (Georgia 1995) (judge ordered arrest of entire County Board of Commissioners, which whom she was having a salary dispute); *Inquiry Concerning Gallagher*, 951 P.2d 716 (Oregon 1998) (judge used official stationary to solicit campaign contributions); Gary Sprott, Corporal Wanted Transfer, Sheriff Says, Tampa Tribune, February 13, 2001, available at 2001 WL 5493834 (judge forced staff to work on his re-election campaign); Gwen Filosa, Judge Asks for 1-year Penalty, New Orleans Times-Picayune, June 14, 2003, available at 2003 WL 4014626 (judge directed his staff to sell tickets to political fundraisers); Tiffany Y. Latta, Charges Pending Against Judge; Allegations Include Sexual Harassment, Improper Solicitation of Campaign Funds, Columbus Dispatch, June 14, 2003, available at 2003 WL 57336738 (judge hit up staff for campaign contributions); Judge Issues Regrets for Re-election Remarks, Raleigh News & Observer, December 1, 2000, available at 2000 WL 29351535 (judge demanded campaign contributions from attorneys); Judicial Reform Needed Now, New Orleans Times-Picayune, May 25, 2003, available at 2003 WL 4010966 (judge reportedly coerced his staff to work on his reelection campaign).

[67] *See, e.g.,* Alaska Commission on Judicial Conduct, Formal Ethics Opinion # 012, available at ., http://www.ajc.state.ak.us/CONDUCT.htm (use of official title and court system phone number to conduct personal business); *Public Admonishment of Judge Robert C. Coates*, California Commission on Judicial Performance, April 12, 2000, available at http://www.cjp.ca.gov/PubAdmRTF/CoatesPA_04-12-00.rtf (judge used official title in applying for loans and seeking better service from merchants); *Inquiry Concerning Judge D. Ronald Hyde*, California Commission on Judicial Performance, May 14, 1996, available at http://cjp.ca.gov/CNCensureRTF/HydeCNCN_05-14-96.rtf (judge accessed DMV records to compile private mailing list); *Inquiry Concerning Judge James Randal Ross*, California Commission on Judicial Performance, April 30, 1998, available at http://cjp.ca.gov/CNCensureRTF/RossCNCN_04-30-98.rtf (judge sold copies of his book at the courthouse and promoted it to jurors); *In the Matter of the*

hand gun, had him arrested and charged with theft, procured a guilty plea and jury waiver, conducted a midnight proceeding in the police station and sentenced [him] to 8 months in jail."[69]

Bad judges also misappropriate public resources, dipping into the public till for personal expenditures,[70] falsifying expense records for travel, meals and lodging [71] facilitating bogus reimbursement requests by staff,[72] misusing the franking privilege,[73] and requiring criminal defendants to contribute to their pet charities in lieu of fines.[74] They also waste public funds for unnecessary expenditures such as boondoggles to useless seminars.[75]

Honorable Gary J. Davis, Case No. 9502-107, Nevada Commission on Judicial Discipline, December 1995, available at http://judicial.state.nv.us/davisfindings.htm (judge carried on an antiques business from the courthouse).

[68] *See Inquiry Concerning Campbell*, 426 S.E.2d 552 (Georgia 1993) (chauffeur and translation services); *In re Judge Judith Rogers*, Arkansas Judicial Discipline & Disability Commission, March 22, 2000, available at http://www.state.ar.us/jddc/pdf/rogers.96.119.PDF (personal errands); *Inquiry Concerning Judge D. Ronald Hyde*, California Commission on Judicial Performance, May 14, 1996, available at http://cjp.ca.gov/CNCensureRTF/HydeCNCN_05-14-96.rtf (babysitting); *In the Matter of the Honorable Gary J. Davis*, Case No. 9502-107, Nevada Commission on Judicial Discipline, December 1995, available at http://judicial.state.nv.us/davisfindings.htm (chauffeur services).

[69] *In re William D. Vanderwater*, No. 76 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm.

[70] *See Inquiry Concerning Campbell*, 426 S.E.2d 552 (Georgia 1993) (judge removed more than $15,000 from the magistrate's court); *In the Matter of the Honorable Gary J. Davis*, Case No. 9502-107, Nevada Commission on Judicial Discipline, December 1995, available at http://judicial.state.nv.us/davisfindings.htm (judge took petty cash advances from court register); Two Judges Face Censure for Judicial Misconduct, Salt Lake Tribune, January 7, 1999, available at 1999 WL 3340968 (judge stole bail money to cover personal debts); Brendan Smith, Espanola Group's Deposits Queried, Albuquerque Journal, September 27, 2003, available at 2002 WL 100703036 (judge allegedly deposited $19,000 of public funds into account of nonprofit group he controlled).

[71] Tracy Dash, Wes Teel Continued His Duties, Court Told, Biloxi Sun Herald, February 21, 2002, available at 2002 WL 11385779 (judges resigned in order to avoid prosecution for falsifying expense records).

[72] *See, e.g*., *In the Matter of the Honorable Raymond L. Kern*, 774 N.E.2d 878 (Ind. 2002) (judge submitted false mileage claims for employees who had already been paid).

[73] *See In re Samual G. Harrod, III*, No. 80 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge used official frank for self-promotional mailings).

[74] *See In the Matter of the Honorable Gary J. Davis*, Case No. 9502-107, Nevada Commission on Judicial Discipline, December 1995, available at http://judicial.state.nv.us/davisfindings.htm (judge directed criminal defendants to contribute to designated charities in lieu of fines).

[75] *See In re Judge Pamela Taylor Johnson*, 767 So.2d 2 (La. 2000) (refusing by 3-2 vote to discipline judge for authorizing court employees to attend seminars unrelated to their job functions).

Incompetence and Neglect of Duties. Bad judges may lack even slight command of the law.[76] They confuse elementary burdens of proof and persuasion,[77] misunderstand fundamental rights,[78] rule prematurely,[79] and generally display egregious ignorance of the rules that supposedly govern their decisions. Bad judges procrastinate.[80] Whether because of emotional problems[81] or laziness,[82] they fail to rule on motions, set cases for

[76] For an account claiming that incompetence is rampant in the New York State Supreme Court in Queens, *see* Douglas Feiden, Trial and Error in Queens Courts, New York Daily News, July 7, 2003. p. 3.

[77] *See In re Euguene R. Ward*, No. 73 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge gave a judgment to a plaintiff who had presented no evidence); Douglas Feiden, Trial and Error in Queens Courts, New York Daily News, July 7, 2003. p. 3 (judge forgot that the jury in a criminal case must find guilt beyond a reasonable doubt).

[78] *See In re Hathaway*, 630 N.W.2d 850 (Mich. 2001) (judge threatened to imprison criminal defendant if he did not waive jury trial); *In the Matter of Honorable Douglas A. Cox*, 680 N.E.2d 528 (Ind. 1997) (judge penalized a litigant for insisting on a jury trial); *In the Matter of Vaughn*, 462 S.E.2d 780 (Georgia 1995) (judge forced defendant to enter guilty plea without counsel present); *Inquiry Concerning Judge Howard R. Broadman*, California Commission on Judicial Conduct, February 26, 1999, available at http://www.cjp.ca.gov/PubAdmRTF/BroadmanPA_02-26-99.rtf (judge refused to allow a litigant to present evidence, testify under oath, and cross-examine witnesses); Stuart Pfeifer, Ex-Doctor's Sexual Battery Conviction is Voided, Los Angeles Times, May 30, 2002, available at 2002 WL 2479320 (judge allowed defendant to be questioned under oath in front of the jury without counsel present); John Sullivan, Durham Judge's Censure Sought, Raleigh News & Observer, January 12, 2000, available at 2000 WL 3909876 (judge convicted a defendant of a crime with which he had not been charged).

[79] *See In re Judge W.Q. Hall*, Arkansas Judicial Discipline & Disability Commission, November 22, 1999, available at http://www.state.ar.us/jddc/pdf/sanctions/hall_98-284.pdf (judge entered judgment even though neither party had appeared); *In re Robert J. Sulski*, No. 73-CC-4, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge convicted a defendant before the defense rested); Terry Dickson, Hammill Faces New Complaint, Florida Times-Union, October 19, 2001, available at 2001 WL 25999931 (judge ordered party to pay money without a hearing).

[80] *See, e.g., In the Matter of the Complaint Against Van Susteren*, 118 Wis.2d 806, 348 N.W.2d 579 (1984) (judge took eighteen years to resolve a probate matter); Doug Guthrie, Deal Allows Jelsema to Retire, Avoid Discipline, Grand Rapids Press, February 11, 2003, available at 2003 WL 4846457 (judge allowed a child support case to linger for more than a decade); *In re Euguene R. Ward*, No. 73 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge entered judgment for a plaintiff in a case that had been settled).

[81] *See, e.g., In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law, in Relation to Robert N. Going, a Judge of the Family Court, Montgomery County*, New York State Commission on Judicial Conduct, December 29, 2000, available at http://www.scjc.state.ny.us/Determinations/G/going(2).htm (anxiety attacks); *In the Matter of Carpenter*, 17 P.3d 91 (Ariz. 2001) (narcolepsy); Richard Winton, Los Angeles Panel Fires Judge Who Resigned, Los Angeles Times, May 11, 2001, available at 2001 WL 2486155 (phobia of the bench); Michael Rezendes, Conduct Ruling Delayed So Judge Could Retire, Boston Globe, July 29, 2000, available at 2000 WL 3336538 (obsessive-compulsive disorder).

[82] *See Matter of The Proceeding Pursuant to Section 44, Subdivision 4, of The Judiciary Law, In Relation To J. Kevin Mulroy, A Judge Of The County Court, Onondaga County*, New York Law Journal, August 23, 1999 (judge pressured a prosecutor to offer a plea because the judge wanted to get home for "men's night out"); *Kennick v. Commission on Judicial Performance*, 787 P.2d 591 (California 1990) (judge quit showing up for court prior to his retirement); *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995) (judge was habitually 60 to 90 minutes late in commencing court sessions);

trial, or issue decisions.[83] Poor administration can also be an issue. Bad judges lose evidence,[84] misplace files,[85] mismanage staff,[86] and fail to keep accounts of the court's financial registry.[87] They neglect official responsibilities by delegating them to law clerks,[88] prosecutors,[89] court clerks,[90] and even law students[91] and law professors![92]

Brendan Smith, Some Judges Run Afoul of the Law, Albuquerque Journal, February 10, 2002, available at 2002 WL 12685479 (judge showed up in court only two days a month, would not post a schedule, and was finally removed after failing to appear for four straight months).

[83] *See, e.g*., *In the Matter of Judicial Disciplinary Proceedings Against Dreyfus*, 182 Wis.2d 121, 513 N.W.2d 604 (1994) (judge failed to decide cases in a timely manner); *In re Hathaway*, 630 N.W.2d 850 (Mich. 2001) (judge displayed an "overall lack of industry"); *In re Honorable Thomas P. Breen*, California Commission on Judicial Performance, February 28, 1995, available at http://www.cjp.ca.gov/PubReprovals/Breen_PubR_022895.doc (judge found to have engaged in a continuing pattern of failing to dispose of judicial matters promptly and efficiently); *In the Matter of Honorable William McKimm*, Arkansas Judicial Discipline and Disability Commission, No. 97-284, available at http://www.state.ar.us/jddc/pdf/sanctions/mckimm_97-284_final.pdf (judge failed to handle cases in timely fashion); Voting No on Elected Judges, New York Daily News, December 2, 2001, available at 2001 WL 27989053 (study of justices and surrogates in state courts in New York City concluded that "[n]early one in five missed more than two months of work, 48 failed to meet efficiency targets, one in 10 failed to begin an adequate number of trials and one in 10 did not dispose of an adequate number of cases").

[84] *See* Gwen Filosa, Money Sets Judicial Rivals Apart; Former Prosecutors Vie for Vacated Seat, New Orleans Times-Picayune, October 29, 2002, available at 2002 WL 25262865 (trial judge removed from office after failing to preserve at least a dozen trial transcripts).

[85] *See* Wren Propp, Court Suspends Mora Magistrate, Albuquerque Journal, April 10, 2003, available at 2003 WL 18623941 (county magistrate's office lost paperwork and mishandled court files).

[86] *See In re Judge Sharon K. Hunter*, 823 So.2d 325 (La. 2002) (judge failed to supervise court reporters and other administrative personnel); *In the Matter of the Complaint Against Van Susteren*, 118 Wis.2d 806, 348 N.W.2d 579 (1984) (judge failed to supervise court personnel for prompt and efficient disposition of official business).

[87] *See Boggan v. Judicial Inquiry Commission*, 759 So.2d 550 (Alabama 1999) (judge found to have presented fraudulent deposit slip to auditors of court registry accounts).

[88] *See* Ann W. O'Neill, Appeals Court Criticizes L.A. Judge for 'Egregious' Misconduct, Los Angeles Times, May 25, 2000, available at 2000 WL 2244483 (judge allowed his law clerk to preside over a pre-trial conference).

[89] *See Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (judge delegated part of the sentencing function to prosecutor).

[90] *See In re Inquiry Concerning R.R. Seal*, 585 So.2d 741 (Miss. 1991) (judge allowed clerical personnel to adjudicate criminal cases); *Mississippi Judicial Performance Commission v. Hopkins*, 690 So.2d 857 (Miss. 1991) (judge allowed court clerks to dismiss parking tickets); *In re Eugene R. Ward*, No. 79 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge permitted court clerk to conduct court calls and enter orders).

[91] *See* Janan Hanna, Outspoken Judge Will Take Class to Curb Anger, Chicago Tribune, May 9, 2002 (judge allowed visiting high school students to question an expert witness during a trial).

[92] *See In the Matter of Judicial Disciplinary Proceedings Against Tesmer*, 219 Wis.2d 708, 580 N.W.2d 307 (1998) (judge allowed a law professor to draft judicial opinions).

Overstepping Authority Bad judges disregard of the limits of their authority.[93] Acting as quasi-vigilantes,[94] they engage in personal investigations of alleged wrongdoing,[95] summarily try defendants without allowing them to prepare a defense,[96] sentence them to jailbefore conviction,[97] force cases to trial for inappropriate reasons,[98] become personally involved with litigants,[99] order witnesses arrested,[100] and engage in improper *ex parte* contacts with parties[101] and witnesses.[102] Misuse of the contempt power is common. Bad judges inappropriately hold people in contempt for offenses such

[93] As the Supreme Court of Florida described one such judge, "Graham made what he perceived to be a valiant effort at ridding Citrus County of . . . political favoritism and government corruption His zealous pursuit of a pure society apparently clouded his ability to impartially adjudicate the matters before him. His motives are acceptable, but his methods are not." *Inquiry Concerning Graham*, 620 So.2d 1273 (Fla. 1993).

[94] One judge chased a couple in his own car when he observed their vehicle being operated in a reckless manner, then forced them to appear before him in an "unofficial" hearing in order to teach them a lesson. True Tragedy: Judge's Loss Should be Retold Accurately, Columbus Dispatch, September 21, 1999, available at 1999 WL 27421423.

[95] *See* Cheryl Reid, Tollefson, Stolz Say They Offer Clear Choice, Tacoma News Tribune, October 12, 2000, available at 2000 WL 5339113 (judge launched his own investigation of a child custody case).

[96] *See In re Judge Preston Aucoin*, 767 So.2d 30 (La. 2000) (judge censured for practice of ordering "instanter trials" immediately after defendants pleaded not guilty at arraignment).

[97] *See Inquiry Concerning Fred L. Heene, Jr.*, October 13, 1999, California Commission on Judicial Performance, available at http://cjp.ca.gov/CNCensureRTF/HeeneCNCN_10-13-99.rtf (judge summarily jailed a defendant for failing to complete community service obligation).

[98] *See* Douglas Feiden, Trial and Error in Queens Courts, New York Daily News July 7, 2003 (judge pushed a case to trial because he "felt it was necessary for the therapy" of the victim to "tell her story" in order to "reach closure").

[99] *See Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (judge encouraged a defendant in a family law matter to attend a religious men's fellowship meeting at the judge's house where the defendant's personal problems became a focus for discussion);Arkansas Judicial Discipline and Disability Commission, Press Release, November 24, 1998, available at http://www.state.ar.us/jddc/pdf/mckimswin.pdf (judge drove a juvenile he had sentenced to a detention center, and when the center refused to accept the boy, took him to a gambling casino).

[100] *See Inquiry Concerning Fred L. Heene, Jr.*, October 13, 1999, California Commission on Judicial Performance, available at http://cjp.ca.gov/CNCensureRTF/HeeneCNCN_10-13-99.rtf (judge summarily ordered arrest of complaining witness in a rape case after she admitted giving a false statement to the police).

[101] *Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (judge engaged in persistent *ex parte* contacts with parties).

[102] *In re Honorable Frances-Ann Fine*, No. 9802-222, Nevada Commission on Judicial Discipline, October 1998, available at http://www.judicial.state.nv.us/finefindings98.htm (family court judge persistently spoke *ex parte* with therapists and family services personnel in attempts to resolve matters pending before her).

as whispering,[103] napping,[104] tardiness,[105] truancy,[106] sassiness,[107] and wearing annoying tee shirts.[108] Judges find people in contempt of court *in absentia*[109] or when court is not in session.[110] They deny people the opportunity to respond to citations for contempt,[111] summarily ban people from their courtrooms,[112] and intimidate people by threats of contempt.[113]

Interpersonal Abuse at the Workplace. Bad judges abuse nearly everyone in their professional environment: attorneys,[114] law clerks,[115] secretaries,[116] court reporters,[117]

[103] *See Inquiry Concerning Judge William M. Ormsby*, California Commission on Judicial Performance, March 20, 1996, available at http://cjp.ca.gov/CNCensureRTF/OrmsbyCNCN_03-20-96.rtf. (judge ordered summary arrest of spectators and parties for whispering in court).

[104] *See Inquiry Concerning Judge William M. Ormsby*, California Commission on Judicial Performance, March 20, 1996, available at http://cjp.ca.gov/CNCensureRTF/OrmsbyCNCN_03-20-96.rtf (judge summarily ordered party into custody for appearing to fall asleep in court).

[105] *See Inquiry Concerning Fred L. Heene, Jr.*, October 13, 1999, California Commission on Judicial Performance, available at http://cjp.ca.gov/CNCensureRTF/HeeneCNCN_10-13-99.rtf (judge summarily declared juror in contempt for being late to court).

[106] *See, e.g.*, *In the Matter of the Honorable Donald C. Johnson*, 658 N.E.2d 589 (Ind. 1995) (judge ordered arrest of attorney who did not appear in court, then held summary contempt hearing in presence of attorney's client with attorney dressed in prison garb).

[107] *See, e.g.*, *In re Glynn J. Elliott, Jr.*, No. 89 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge verbally abused a high school student who was a spectator at a hearing, had him summarily handcuffed to a chair, berated him again, and again ordered him handcuffed).

[108] *See In re Dexter A. Knowlton*, No. 78 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge sanctioned spectator for wearing tee shirt saying "bitch bitch bitch").

[109] *See, e.g.*, *Public Admonishment of Judge Lisa Guy-Schall*, California Commission on Judicial Performance, October 14, 1999, available at http://www.cjp.ca.gov/PubAdmRTF/Guy-SchallPA_10-14-99.rtf (judge sentenced a party not present in court to five days in jail for contempt).

[110] *See Commission on Judicial Performance v. Chinn*, 611 So.2d 849 (Miss. 1992) (judge held a highway patrolman in contempt when court was not in session).

[111] *See, e.g.*, *Public Admonishment of Judge Lisa Guy-Schall*, California Commission on Judicial Performance, October 14, 1999, available at http://www.cjp.ca.gov/PubAdmRTF/Guy-SchallPA_10-14-99.rtf (judge failed to allow a party the opportunity to respond to citation for contempt).

[112] *In re Keith E. Campbell*, No. 79 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge expelled two reporters from the courtroom when one began sketching a witness, then locked the doors to the courtroom for the remainder of the trial).

[113] *See, e.g., Inquiry Concerning Judge James Randal Ross*, California Commission on Judicial Performance, April 30, 1998, available at http://cjp.ca.gov/CNCensureRTF/RossCNCN_04-30-98.rtf (without proper cause, judge declared "if he says one more word even under his breath in this courtroom I will hold him in contempt of court and you will take him to the Orange County jail").

[114] *See, e.g.*, *In re Elliston*, 789 S.W.2d 469 (Missouri 199) (sixteen attorneys testified to their personal experiences with abusive judge); *Inquiry Concerning Judge Bruce Van Voorhis*, California Commission on Judicial Performance, February 27, 2003, available at http://cjp.ca.gov/CN%20Removals/Van%20Voorhis%202-27-03.rtf (judge denigrated an attorney's competence in open court and conducted mocking colloquy with the jury present); *In the Matter of the*

clerical staff,[118] litigants,[119] fact witnesses,[120] expert witnesses,[121] jurors,[122] law professors,[123] law students,[124] spectators,[125] reporters,[126] and other judges.[127] In the worst

Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Ira J. Raab, New York State Commission on Judicial Conduct, February 3, 2003, available at http://www.scjc.state.ny.us/Determinations/R/raab.htm (judge displayed persistent pattern of abuse towards attorneys); Tom Bailey Jr., 'New' McCalla Debuts as Jocular, Lawyer-Friendly, Memphis Commercial Appeal, September 17, 2002, available at 2002 WL 24948083 (describing abusive judge's attempt at rehabilitation); Judge's Penalty is Appropriate, South Florida Sun-Sentinel, April 12, 2003, available at 2003 WL 16669207 (judge belittled attorneys who appeared before him, threw tantrums, and exhibited intemperate and unreasonable behavior); Ralph Ranalli, Lopez Resigns, Denies Misdeeds; Says Accepting Findings Goes Against Principles, Boston Globe, May 20, 2003, available at 2003 WL 3397208 (judge was persistently rude, hasty, discourteous, sarcastic, and condescending towards prosecutors).

[115] *See In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law, in Relation to Robert N. Going, a Judge of the Family Court, Montgomery County*, New York State Commission on Judicial Conduct, December 29, 2000, available at http://www.scjc.state.ny.us/Determinations/G/going(2).htm (judge became abusive towards law clerk after termination of romantic relationship between them).

[116] *See, e.g*., *In the Matter of McClain*, 662 N.E.2d 935 (Ind.1996) (judge sent vulgar letters to secretary employed at the courthouse and enclosed a used condom); Voting No on Elected Judges, New York Daily News, December 2, 2001, available at 2001 WL 27989053 (judge made offensive sexual comments to his secretary).

[117] *See* Timothy R. Brown, Increasing Number of Judges Being Judged in Miss. Courts, Baton Rouge Advocate, January 3, 2002 (judge accused of beating his own court reporter).

[118] *See* Transfer Puts Judge in Concord, Contra Costa Times, October 24, 2002, available at 2002 WL 100622730 (judge sanctioned for abusing staff); Scott Sandlin, Metro Judge's Suspension Upheld, Albuquerque Journal, December 19, 2001, available at 2001 WL 31469050 (judge charged with being threatening and abusive to court staff); Miss. High Court Orders Judge Reprimanded, Baton Rouge Advocate, October 12, 2001, available at 2001 WL 3872539 (judge accused of verbally abusing court clerks and other county employees); Cheryl Reid, Tollefson, Stolz Say They Offer Clear Choice, Tacoma News Tribune, October 12, 2000, available at 2000 WL 5339113 (judge chased court employees down a hallway in a rage).

[119] *See, e.g*., Robynn Tysver, Omaha Judge Reprimanded for Mistreating Defendants, Omaha World-Herald, September 30, 2000, available at 2000 WL 4374792 (judge routinely yelled at and berated defendants who appeared before him).

[120] *See In the Matter of Judicial Disciplinary Proceedings Against the Honorable Ralph G. Gorenstein*, 174 Wis.2d 861, 434 N.W.2d 603 (1989) (judge criticized witness for crying on the stand).

[121] *See In the Matter of Judicial Disciplinary Proceedings Against the Honorable Ralph G.Gorenstein*, 174 Wis.2d 861, 434 N.W.2d 603 (1989) (judge made denigrating remarks about facility with which expert witnesses were associated); Ann W. O'Neill, Appeals Court Criticizes L.A. Judge for 'Egregious' Misconduct, Los Angeles Times, May 25, 2000, available at 2000 WL 2244483 (judge engaged in demeaning questioning of expert witness).

[122] Transfer Puts Judge in Concord, Contra Costa Times, October 24, 2002, available at 2002 WL 100622730 (judge found to have mistreated jurors).

[123] *See In re Alan R. Schwartz*, 755 So.2d 110 (Fla. 2000) (judge made sarcastic remarks about law professor who was appearing in court and denigrated textbook she had written).

[124] *See In re Alan R. Schwartz*, 755 So.2d 110 (Fla. 2000) (judge threatened to sanction legal clinic student and then walked out before she completed her argument).

[125] Miss. Panel Seeks Ouster of Judge for Misconduct, Memphis Commercial Appeal, December 17, 1998, available at 1998 WL 21183913 (judge allegedly had spectator arrested for leaning sideways on a bench, then ordered a body cavity search).

cases, the animosity boils over into assaults.[128] Judges are also accused of sexually harassing a virtual census of courthouse workers: prosecutors,[129] public defenders,[130] probation officers,[131] court reporters,[132] caseworkers,[133] bailiffs,[134] administrative clerks,[135] interns,[136] secretaries,[137] other employees,[138] journalists,[139] law clerks,[140] and even fellow judges.[141]

[126] Miss. Panel Seeks Ouster of Judge for Misconduct, Memphis Commercial Appeal, December 17, 1998, available at 1998 WL 21183913 (judge ordered reporter arrested for publishing juvenile arrest record).

[127] *See In the Matter of Judicial Disciplinary Proceedings Against the Honorable Robert Crawford*, 629 N.W.2d 1 (Wisconsin 2001) (judge threatened to publicize purported evidence of misconduct by chief judge); *Inquiry Regarding Jose Angel Velasquez*, California Commission on Judicial Performance, April 16, 1997, available at http://cjp.ca.gov/CNCensureRTF/VelasquezCNCN_04-16-97.rtf (judge made public statements disparaging fellow judges); Joe Gyan Jr., Judge Receives 30-day Suspension, Baton Rouge Advocate, November 29, 2001, available at 2001 WL 3876933 (judge cursed at two fellow judges); *In re Jones*, 581 N.W.2d 876 (Neb. 1998) (judge said "fuck you" to fellow judge and called her a "bitch").

[128] *See, e.g., Commission on Judicial Performance v. Guest*, 717 So.2d 325 (Mississippi 1998) (assault on a litigant); Joe Gyan Jr., Judge Receives 30-day Suspension, Baton Rouge Advocate, November 29, 2001, available at 2001 WL 3876933 (assault on judge).

[129] *See In re the Matter of Honorable Mark S. Deming*, 736 P.2d 639 (Wash. 1987) (judge commented on breasts of prosecuting attorney and told another prosecutor that he wanted to "jump your bones"); Robert Becker, State Ousts Judge, Cites Harassment, Chicago Tribune, December 4, 2001, available at 2001 WL 30798221 (judge sexually harassed four female prosecutors).

[130] *See In the Matter of the Complaint Against Seraphim*, 97 Wis.2d 485, 294 N.W.2d 485 (1980) (secretary at public defender's office).

[131] *See In re the Matter of Honorable Mark S. Deming*, 736 P.2d 639 (Wash. 1987) (judge harassed county district court probation personnel); *In re Richard D. Cicchetti*, 743 A.2d 431 (Pa. 2000) (judge harassed female probation officer).

[132] *See In re Richard D. Cicchetti*, 743 A.2d 431 (Pa. 2000) (judge made repeated unwanted phone calls to court reporter and asked her for dates).

[133] *See In the Matter of the Complaint Against Seraphim*, 97 Wis.2d 485, 294 N.W.2d 485 (1980) (judge sexually harassed employee of private social services agency).

[134] *See Inquiry Concerning Judge W. Jackson Willoughby*, California Commission on Judicial Performance, June 27, 2000, available at http://cjp.ca.gov/CNCensureRTF/WilloughbyCNCN_06-27-00.rtf (judge engaged in improper and unwanted touching of bailiff's breasts).

[135] *See Inquiry Concerning Judge W. Jackson Willoughby*, California Commission on Judicial Performance, June 27, 2000, available at http://cjp.ca.gov/CNCensureRTF/WilloughbyCNCN_06-27-00.rtf (judge made kissing gestures towards his administrative clerk and told her he wanted her to "sit there and look pretty"); Wren Propp, Court Suspends Mora Magistrate, Albuquerque Journal, April 10, 2003, available at 2003 WL 18623941 (county magistrate accused of sexually harassing administrative clerk); *In re the Matter of Honorable Mark S. Deming*, 736 P.2d 639 (Wash. 1987) (judge sexually harassed docket clerk).

[136] *In re the Matter of Honorable Mark S. Deming*, 736 P.2d 639 (Wash. 1987) (judge sexually harassed law student intern).

[137] *See* Tiffany Y. Latta, Charges Pending Against Judge, Columbus Dispatch, June 14, 2003, available at 2003 WL 57336738 (judge charged with sexually harassing secretary).

[138] *See* Christopher Goffard, Memos in Harassment Case are Public, Court Rules, St. Petersburg Times, February 14, 2003, available at 2003 WL 12204666 (judicial assistants); Christine Mahr, Judge's

Bias, Prejudice and Insensitivity. Bad judges display bias, prejudice, and stereotypical thinking. In criminal cases, they manifest prejudice against the prosecution[142] and the accused.[143] They display sexist attitudes against both women[144] and men.[145] They insult a melting pot of groups including African Americans,[146]

Hearing Canceled; Settlement Proposed, Desert Sun, October 19, 2002, available at 2002 WL 25960154 (court employee).

[139] *See In the Matter of the Complaint Against Seraphim*, 97 Wis.2d 485, 294 N.W.2d 485 (1980) (judge behaved in sexually aggressive manner towards journalism student).

[140] *See In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law, in Relation to Robert N. Going, a Judge of the Family Court, Montgomery County*, New York State Commission on Judicial Conduct, December 29, 2000, available at http://www.scjc.state.ny.us/Determinations/G/going(2).htm (judge harassed law clerk after termination of romantic relationship between them).

[141] *See, e.g*., Fawn Germer, Intrigue, Investigations Embroil a Courthouse; From Public Defender to Chief Judge, Allegations Seem Epidemic in Florida's Hillsborough County, Washington Post, August 9, 2000, available at 2000 WL 19623310 (judge sent email to fellow jurist suggesting liaison).

[142] *See, e.g*., *In re Duckman*, 677 N.Y.S.2d 248, 92 N.Y.2d 141, 699 P.2d 872 (1998) (judge improperly dismissed charges against criminal defendants and verbally humiliated prosecutors), Ralph Ranalli and Joanna Weiss, Friends Say Lopez Will Quit Bench, Boston Globe, May 15, 2003, available at 2003 WL 3396366 (judge displayed bias against the prosecutors raising fundamental questions about her fitness to serve); Gwen Filosa, 2 Felons Sue Courts, New Orleans Times-Picayune, February 28, 2003, available at 2003 WL 3995220 (judge allegedly improperly allowed more than a thousand suspects go free without posting bond); Douglas Feiden, Trial and Error in Queens Courts, New York Daily News July 7, 2003 (judge joked when a prosecutor collapsed with chest pains, telling him not to "take it so personally") .

[143] *See, e.g*., *In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Mark C. Dillon, a Justice of the Supreme Court, Westchester County*, New York State Commission on Judicial Conduct, February 6, 2002 (judge gave a speech after jury verdict lambasting defense counsel); David Rosenzweig, Judge Removed From Case Over Remark, Los Angeles Times, March 14, 2001, available at 2001 WL 2469672 (judge questioned credibility of criminal defendants who testify in their own defense); John Caher, Agency's Authority to Act Under 'Spargo' Clarified: Prosecutions for Behavior on the Bench May Proceed, New York Law Journal, April 22, 2003 (judge allegedly engaged in a persistent conduct of "denying rights to counsel, setting unreasonably high bail, coercing guilty pleas, [and] entering convictions against defendants who were not before him"); Janan Hanna, Outspoken Judge Will Take Class to Curb Anger, Chicago Tribune, May 9, 2002 (judge interrupted defense lawyer's closing arguments 45 times and suggested that defense witnesses were thieves and drug addicts); Dennis Opatrny, More Than Half of S.F. Bench up for Re-Election, San Francisco Recorder, May 8, 2001 (judge reassigned from criminal cases after being accused of bias by public defender's office); Ann W. O'Neill, Appeals Court Criticizes L.A. Judge for 'Egregious' Misconduct, Los Angeles Times, May 25, 2000, available at 2000 WL 2244483 (judge created the impression that he was allied with the prosecution).

[144] *See In re Arthur J. Cieslik*, No. 87 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge made "intemperate, rude and sexist remarks to women attorneys during official proceedings"); *In re John R. Goshgarian*, No. 98 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge referred to female judge in a derogatory and insulting manner).

[145] *See* Michele McPhee, Cases vs. Diamond Dismissed, New York Daily News, April 3, 2003, available at 2003 WL 4070323 (judge was allegedly so hostile to men in divorce cases that husbands who had appeared before her formed a support group and filed complaints of judicial misconduct); Douglas Feiden, Trial and Error in Queens Courts, New York Daily News, July 7, 2003 (judge dispensed toothbrushes to "deadbeat dads" before packing them off to jail).

Hispanics,[147] Jews,[148] Catholics,[149] Italian-Americans,[150] English,[151] Danes,[152] Yugoslavians,[153] Japanese,[154] and otherwise-unidentified undocumented aliens.[155] They look down on poor people,[156] harbor animosity against homosexuals,[157] and scold or discriminate against women for being prostitutes,[158] unwed mothers,[159] welfare

[146] *See In re Goodfarb*, 880 P.2d 620 (Arizona 1994) ("fucking n-----s"); *Public Admonishment of Judge Richard S. Flier*, California Commission on Judicial Performance, May 30, 1995, available at http://cjp.ca.gov/PubAdmRTF/FlierPA_05-30-95.rtf ("good boy"); John Caher, Commuter Tax Fight Next on Court Agenda, New York Law Journal, February 4, 2000 ("n--- bitch"); Mickey Ciokajlo, Judge Accused of Misconduct; State Agency Cites Behavior, Remarks in Court, Chicago Tribune, May 16, 2002, available at 2002 WL 2655613 ("boy").

[147] Karen Dorn Steele, Passing Notes: Judge, Clerk Make Ethnic Slurs; Investigation Prompts Reprimand, IRE Journal, March 1, 2002, available at 2002 WL 8759893 (judge referred to Hispanics as "greasers").

[148] See Fredric U. Dicker, Panel Slams Judge's 'Bizarre' Religious Remarks, New York Post, October 4, 2003, at 2 (Judge insulted lawyer, and when lawyer complained, judge asked if the lawyer was Jewish").

[149] See Fredric U. Dicker, Panel Slams Judge's 'Bizarre' Religious Remarks, New York Post, October 4, 2003, at 2 (Judge remarked in open court that he would "never" send his children to Catholic school – even though he in fact had done so – and stated that in light of press accounts of "what was occurring in Catholic schools" he would not permit any funds to be used for Catholic education).

[150] Karen Dorn Steele, Passing Notes: Judge, Clerk Make Ethnic Slurs; Investigation Prompts Reprimand, IRE Journal, March 1, 2002, available at 2002 WL 8759893 (judge referred to labor union representatives as "mafia").

[151] Douglas Feiden, Trial and Error in Queens Courts, New York Daily News July 7, 2003 (judge engaged in an anglophobic tirade against a defendant of British heritage).

[152] Mary Wisniewski, Watching the Watchdogs Watch: The JIB and Courts Commission, Chicago Lawyer, March 1999 (judge suggested that Danes have loose sexual morals).

[153] Mary Wisniewski, Watching the Watchdogs Watch: The JIB and Courts Commission, Chicago Lawyer, March 1999 (judge made arguably disparaging remarks about Yugoslavians).

[154] *See In re Richard Haugner*, California Commission on Judicial Performance, April 11, 1994, available at http://www.cjp.ca.gov/PubReprovals/Haugner_PubR_041194.doc (judge made comments that were insensitive to persons of Japanese ancestry and reflected possible racial or ethnic bias).

[155] *See* H.G. Reza and Christine Hanley, New Trial for O.C. Migrant, Los Angeles Times, June 5, 2003, available at 2003 WL 2415238 (judge displayed such overt bias against undocumented aliens that an appeals panel found a manifest miscarriage of justice).

[156] *See, e.g., In re Michelson*, 225 Wis. 2d 221, 591 N.W.2d 843 (1999) (bias based on socioeconomic status).

[157] *See, e.g., In re Susan J. McDunn*, No. 01 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge allegedly sought to thwart lesbian couples seeking adoptions); Reprimand urged for Judge: Remark on Homosexuals Cited, Biloxi, Miss. Sun-Herald, December 21, 2002, available at 2002 WL 101468021 (judge wrote letter to the editor suggesting that homosexuals belong in mental institutions).

[158] *See In re David Cerda*, No 76 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge employed the bail system as a means of punishing defendants in prostitution cases).

[159] Alisa Lapolt, Reprimand, Training Urged for Racine Judge Over Unwed Mother Remarks, Milwaukee Journal Sentinel, November 2, 1998, available at 1998 WL 14049209 ("I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut").

abusers,[160] and caregivers.[161] Bias against particular organizations is also reported. One judge fulminated about the ACLU.[162] Another asserted that the defendant in a products liability case "would go to any lengths to make life miserable for somebody."[163]

Attitudes towards sex crimes evoke particularlyshocking displays. One judg e admonished an 11-year old abuse victim that it "takes two to tango."[164] Another labeled a rape victim as the kind that works men "into a frenzy."[165] A Boston judge described a man who had kidnapped and attempted to rape an 11-year-old boy as "on a very low level" compared with other sex offenders.[166] Another judge seemed to countenance a teacher who had an affair with a 13-year-old student, remarking, "[i]t's just something between these two people that clicked beyond the teacher-student relationship" and suggesting that the affair was a way for the victim to "satisfy his sexual needs." [167]

Personal Misconduct. Bad judges display an impressive range of private foibles.[168] They shoplift,[169] pass bad checks,[170] evade taxes,[171] steal from clients,[172]

[160] *See In the Matter of Judicial Disciplinary Proceedings Against the Honorable Ralph G. Gorenstein*, 174 Wis.2d 861, 434 N.W.2d 603 (1989) (judge berated women with minor children for abusing the welfare system).

[161] *See, e.g*., *Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (judge remarked of an absent attorney, "she probably had something more important to do today, like go to a PTA meeting").

[162] Stephen Hunt, Remarks by a Judge Upset Attorney, ACLU, Salt Lake Tribune, October 16, 2002, available at 2002 WL 4272212 (criticizing ACLU for "whining and complaining" rather than helping people).

[163] William Kleinknecht, Appeals Court Finds Bias Against Automaker - Cites Judge's 'Antagonism' in Case of Accident that Left Teen Paraplegic, Newark Star-Ledger, June 4, 2003, available at 2003 WL 18702778.

[164] Michael E. Ruane, Md. Judge Warned for Scolding Sex Victim, 11, Washington Post, June 22, 2000, available at 2000 WL 19615927.

[165] In Other Words, Las Vegas Review-Journal, August 21, 1999, available at 1999 WL 9291270.

[166] *See, e.g.,* Joe Fitzgerald, Apology Now Would be Too Little, Too Late, Boston Herald, April 30, 2003, available at 2003 WL 3023916 (describing how boy was ordered by transsexual to perform a sex act at the point of a screwdriver).

[167] MichaelAnn Knotts, Judge Reprimanded for Sex Case Remarks, New Jersey Lawyer, May 12, 2003.

[168] For general treatment, *see* Steven Lubet, Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges (1984).

[169] *See Inquiry Concerning Garrett*, 613 So.2d 463 (Florida 1993) (judge shoplifted a VCR from a Target store); *In the Matter of Honorable Berlin Jones*, Case No. 99-321, Arkansas Judicial Discipline and

embezzle from escrow accounts,[173] plant evidence,[174] make threats,[175] extort bribes,[176] gamble,[177] obstruct justice,[178] give misleading testimony,[179] breach fiduciary duties,[180]

Disability Commission, September 21, 2000, available at http://www.state.ar.us/jddc/pdf/JONES.321.PDF (judge took $10.76 worth of items from hardware store); Liz Fabian, Mayor Will Decide Judge's Fate Monday, Macon Telegraph, May 21, 2003, available at 2003 WL 2558398 (judge accused of shoplifting $80 in groceries from a Kroger store).

[170] *See, e.g*., *Inquiry Concerning Judge James I. Aaron*, California Commission on Judicial Performance, July 8, 2002, available at http://cjp.ca.gov/CNCensureRTF/Aaron%207-8-02.rtf (judge attempted to evade financial obligations by writing worthless checks); *In the Matter of the Honorable Morris W. Thompson*, Arkansas Judicial Discipline and Disability Commission, December 6, 1999, available at http://www.state.ar.us/jddc/pdf/Thompson141.PDF (judge passed 59 bad checks in a four-year period); Terry Dickson, Hammill Faces New Complaint: Glynn Magistrate's Removal Sought, Florida Times-Union, October 19, 2001, available at 2001 WL 25999931 (judge accused of writing more than 40 bad checks on account of his former law practice); Circuit Judge Is Removed by Justices, Los Angeles Times, June 2, 2000, available at 2000 WL 2246804 (judge removed from office for offenses including writing bad checks).

[171] *See Judicial Discipline and Disability Commission v. Thompson*, 16 S.W.3d 212 (Ark. 2000) (judge willfully failed to pay federal income taxes); *In re Robert J. Dempsey*, No. 86 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge failed to report income from his real estate investments to the IRS or state revenue department); *In the Matter of the Complaint Against Van Susteren*, 118 Wis.2d 806, 348 N.W.2d 579 (1984) (judge failed to timely file state individual income tax returns).

[172] *In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Howard R. George, a Justice of the Watertown Town Court, Jefferson County*, New York State Commission on Judicial Conduct, February 4, 2002, available at http://www.scjc.state.ny.us/Determinations/G/george_2002.htm (judge misappropriated funds of incarcerated client); Sarah Duran, Lawyer Not Sorry he Blabbed, Tacoma News Tribune, May 8, 2002, available at 2002 WL 3196984 (judge sold property belonging to a former client in exchange for payments on the judge's Cadillac).

[173] *See In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Edmund G. Fitzgerald, Jr., a Judge of the City Court of Yonkers, Westchester County*, New York State Commission on Judicial Conduct, July 1, 2002, available at http://www.scjc.state.ny.us/Determinations/F/fitzgerald.htm (judge improperly cashed checks for personal expenses from client escrow account).

[174] Dennis Persica, Jeff Judge Arrested in Plot to Plant Drugs, New Orleans Times-Picayune, June 7, 2002, available at 2002 WL 3102493 (judge accused of planting drugs in the vehicle of an enemy).

[175] *In re John J. McDonnell*, No. 73 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge threatened a man and his wife with a handgun); Kara Blond, Suspended Nassau Judge Disbarred for Conduct, Newsday, December 29, 1998, available at 1998 WL 2699747 (judge sent threatening and harassing letters and faxes to an attorney with whom he was having a dispute); Ohio Headlines, Dayton Daily News, January 19, 2001, 2001 WL 3826864 (judge sent a threatening letter to a motorist in a road rage incident); Jean Guccione, Los Angeles Man Seeks Court's Protection After Judge's Threat, Los Angeles Times, October 20, 2002, available at 2002 WL 2512084 (judge accused of making death threats against his daughter's boyfriend).

[176] *See In re Judge Joseph A. Jaffe*, 814 A.2d 308 (Pa.Ct.Jud.Disc. 2003) (judge indicted for extortion).

[177] *See In re Amati*, 776 A.2d 371 (Pennsylvania Court of Judicial Discipline 2002) (judge engaged in illegal gambling).

[178] *See In re Eagen*, 814 A.2d 304 (Pennsylvania Court of Judicial Discipline 2002) (judge attempted to obstruct grand jury investigation of criminality in which he was involved).

promote bogus investment schemes,[181] forge documents,[182] file false police reports[183] and fraudulently procure mortgages.[184] They abuse alcohol,[185] prescription medications,[186] marijuana[187] and methamphetamine,[188] get arrested for drunk driving,[189] and enter rehab

[179] *Inquiry Concerning Hapner*, 718 So.2d 785 (Florida 1998) (judge gave inaccurate, incomplete, and misleading testimony in a domestic violence proceeding to the effect that she had tape recordings of her ex-husband making threats of physical violence).

[180] *See, e.g*., *Inqu iry Concerning Former Judge William H. Sullivan*, May 17, 2002, California Commission on Judicial Performance, available at http://cjp.ca.gov/CNCensureRTF/Sullivan%20CN%20Bar%2005-17-02.rtf (judge took unauthorized personal loans from trust he was administering).

[181] *See Inquiry Concerning Judge James I. Aaron*, California Commission on Judicial Performance, July 8, 2002, available at http://cjp.ca.gov/CNCensureRTF/Aaron%207-8-02.rtf (judge promoted Ponzi scheme and evaded financial obligations).

[182] *See In re Lambros J. Kutrubis*, No. 99 CC-3C, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge forged signature of former friend on numerous tax returns for judge, his wife and entities in which they had an interest).

[183] Brendan Smith, Cases Cover a Wide Range, Albuquerque Journal, February 11, 2002, available at 2002 WL 12685560 (magistrate fired shots at his own car and falsely reported that someone else had done so); Editorial, New York Daily News, April 4, 2003, available at 2003 WL 4070452 (judge claimed that she was receiving threatening letters, but the police concluded that she wrote them herself in order to obtain round-the-clock police protection).

[184] *See In re Robert L. Sklodowski*, No. 87 CC-4, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge falsely claimed a $15,000 downpayment in mortgage application to a bank).

[185] *See, e.g*., William R. Levesque, Report Casts Doubt on Judge's Rehab Program, St. Petersburg Times, June 4, 2002, available at 2002 WL 20771369 (detailing judge's continuing problems with alcohol abuse); A 'Message' For McFalls: The High Court Suspends the Judge Without Pay, Pittsburgh Post-Gazette, April 16, 2002, available at 2002 WL 3810998 (judge attributed bizarre alcohol-induced behavior to trauma from September 11 terrorist attack); Brendan Smith, Some Judges Run Afoul of the Law, Albuquerque Journal, February 10, 2002, available at 2002 WL 12685479 (judge allegedly drove under the influence, left the scene of accident and lied to police officers); Patricia Huang, Panel Recommends Reprimand for Judge, Newark Star-Ledger, February 9, 2002, available at 2002 WL 13449323 (judge who had been convicted of driving under the influence presided over six DUI cases and failed to inform his supervisors of the conviction).

[186] *See In re Judge Steven D. Lawrence*, Arkansas Judicial Discipline & Disability Commission, DATE, http://www.state.ar.us/jddc/pdf/sanctions/lawrence_12_20_2001.pdf (); *In Re Appeal of Larsen*, Pennsylvania Law Weekly, November 4, 2002 (judge found to have engaged in conspiracy related to unlawful acquisition of prescription medications).

[187] *See, e.g*., *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001) (judge flagrantly abused marijuana while presiding over capital murder trial); *In re Frank D. Edwards*, No. 96 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge busted for marijuana possession in Belize).

[188] People Police Log: Az Judge Removed for Misconduct, American Political Network The Hotline, March 10, 2000 (judge accused of methamphetamine abuse).

[189] *See, e.g*., *In the Matter of Michael R. Connor*, 589 A.2d 1347 (N.J. 2001)(DUI); *Inquiry Concerning Former Judge Robert C. Bradley*, California Commission on Judicial Performance, June 3, 1999, available at http://cjp.ca.gov/CNCensureRTF/BradleyCNCN_06-03-99.rtf (same); *In re Honorable Lee Munson*, Arkansas Judicial Discipline & Disability Commission, September 23, 1999, available at http://www.state.ar.us/jddc/pdf/sanctions/Munson99.204.PDF (same); Don Holland, Panel: Former Judge Lost Respect, But Can Recover, Los Angeles Daily News, February 26, 1999, available at 1999 WL 7016465 (same); Lisa Teachey, Visiting Judge Makes Apology After Conviction in DWI Case, Houston

programs at an alarming rate.[190] They collect child pornography,[191] solicit prostitutes[192] and have sex with mentally disabled people.[193] They get into confrontations with spouses,[194] ex-spouses[195] and ex-lovers,[196] and commit assaults,[197] stalking,[198] threats[199] and rape.[200]

Chronicle, April 26, 2001, available at 2001 WL 3016370 (same); Richard Marosi, State Panel Rebukes O.C. Judge in DUI Case, Los Angeles Times, June 21, 2000, available at 2000 WL 2253261 (same).

[190] *See, e.g.*, *Inquiry Concerning Former Judge Robert C. Bradley*, June 3, 1999, California Commission on Judicial Performance, available at http://cjp.ca.gov/CNCensureRTF/BradleyCNCN_06-03-99.rtf (judge spent 28 days at Betty Ford Center); Buddy Nevins and Terri Somers, Judge In Rehab Program; Decision Comes After Arrest On Alcohol Charge at Beachfront Resort, South Florida Sun-Sentinel, December 11, 2001, available at 2001 WL 29960763 (judge committed herself to an alcohol rehab program after being charged with drunk and disorderly conduct at resort).

[191] *See* Monte Morin; Jack Leonard, O.C. Judge is Charged With Possession of Child Porn, Los Angeles Times, November 10, 2001, available at 2001 WL 28927626.

[192] *See, e.g.*, *In re Koch*, 890 P.2d 1137 (Arizona 1995) (judge disciplined after being arrested for solicitation of prostitution); Linda Kleindienst, Florida Court Orders Reprimand for Judge, Fort Lauderdale Sun-Sentinel, June 2, 2000, available at 2000 WL 22176766 (judge acquitted of charges of solicitation but disciplined for attempting to misuse his office after arrest); Court to Decide if Judge Stays on Job; Allegheny County Justice Charged with Patronizing Prostitutes, Harrisburg Patriot, November 26, 1999, available at 1999 WL 5161106 (judge offered undercover policewoman $20 for sex).

[193] See Justin Walden, Judge May Face State Investigation, Removal From Bench For Sex Charges, Binghamton Press & Sun-Bulletin, November 14, 2002, available at 2002 WL 101084847 (judge pleaded guilty to criminal charge of improper contact with a disabled person); *In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Calvin M. Westcott, a Justice of the Hancock Town Court, Delaware County*, New York State Commission on Judicial Conduct, February 3, 2003, available at http://www.scjc.state.ny.us/Determinations/W/westcott_2003.htm (judge convicted of charges related to his sexual contact with a mentally disabled person).

[194] *In the Matter of Turco*, 970 P.2d 731 (Washington 1999) (judge pushed his wife to the ground in public).

[195] *See, e.g.*, Dennis Opatrny, More Than Half of S.F. Bench up for Re-Election, San Francisco Recorder, May 8, 2001 (in plea agreement to avoid conviction, judge agreed to 52-week domestic-violence counseling program following confrontation with his estranged wife).

[196] *See, e.g.*, *In re Koch*, 890 P.2d 1137 (Arizona 1995) (judge assaulted his ex-girlfriend); *In The Matter of Judge Rosemarie R. Williams*, 165 N.J.L.J. 560 (August 6, 2001) (judge had repeated violent confrontations with her ex-lover).

[197] *See* Brendan Smith, Some Judges Run Afoul of the Law, Albuquerque Journal, February 10, 2002, available at 2002 WL 12685479 (magistrate suspended for beating a female companion and then fleeing from arresting officers).

[198] *See* John J. Goldman, N.Y. Judge Charged in Sex Scandal Keeps His Job, Los Angeles Times, November 10, 1992, available at 1992 WL 2840869 (New York State Chief Judge Sol Wachtler accused of stalking and harassment after breakup of romance).

[199] *See, e.g.*, *In re Koch*, 890 P.2d 1137 (Arizona 1995) (judge threatened the life of ex-girlfriend's boyfriend).

[200] *See* Magistrates Need Law Degrees, Albuquerque Journal, March 26, 2003, available at 2003 WL 15990158 (magistrate charged with criminal sexual penetration).

Conflict of Interest. Some judges allow their personal financial interests to come into conflict with their official responsibilities.[201] Conflicts of this sort are inevitable, especially in smaller towns, and can often be cured with disclosure to and consent from counsel. However, judges do not always make such disclosures, even with the conflict is palpable.[202] Judges also moonlight by continuing in law practice after being elevated to the bench.[203]

Inappropriate Behavior in Judicial Capacity. Bad judges display poor judgment and inappropriate behaviors when acting in their judicial capacities. They curse in open court[204] and in professional relationships.[205] They visit pornographic web sites from chambers,[206] leaf through lingerie catalogs in court,[207] ask rape victims for dates,[208] and

[201] Jose Arballo Jr., Ex-judge Censured by Panel, Riverside Press-Enterprise, May 18, 2002, available at 2002 WL 21272392 (judge purchased a house from a man whose conservatorship he had processed); *Inquiry Concerning Former Judge William H. Sullivan*, May 17, 2002, California Commission on Judicial Performance, available at http://cjp.ca.gov/CNCensureRTF/Sullivan%20CN%20Bar%2005-17-02.rtf (judge presided over a probate matter even though he had handled the decedent's financial affairs, witnessed her will, and served as backup executor).

[202] *See, e.g*., *Huffman v. Arkansas Judicial Discipline and Disability Commission*, 42 S.W.3d 386 (Ark. 2001) (judge issued temporary restraining order in favor of Wal-Mart without disclosing that he owned $700,000 in Wal-Mart stock); *In re Honorable Gayle* Forde, Case No. 96-311, Arkansas Judicial Discipline and Disability Commission, available at http://www.state.ar.us/jddc/pdf/sanctions/Ford96.311.PDF (judge failed to disclose that he leased office space to an attorney who appeared before him in a case); *In re Paul R. Durr*, No. 72-CC, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge failed to disclose that an attorney before him was his business partner).

[203] This practice is usually prohibited under the terms of the individual's appointment and violates applicable codes of judicial conduct. *See, e.g*., *Judicial Discipline and Disability Commission v. Thompson*, 16 S.W.3d 212 (Ark. 2000) (judge sanctioned for practicing law after elevation to bench).

[204] *See In re John C. Goshgarian*, No. 98 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm ("fuck you and your office"); *In re Goodfarb*, 880 P.2d 620, 623 (Arizona 1994) (judge stated that attorneys who could not reach a settlement had their "brains fucked up"); *Matter of the Proceeding Pursuant to Section 44, Subdivision 4, of The Judiciary Law, In Relation to J. Kevin Mulroy, a Judge of the County Court, Onondaga County*, New York Law Journal, August 23, 1999 ("[w]hy don't you give this guy a fucking misdemeanor so I can get out of this fucking black hole of Utica").

[205] *See In re John C. Goshgarian*, No. 98 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge used profanity in referring to other judges).

[206] *See, e.g*., *Inquiry Concerning Former Judge Vincent J. McGraw*, California Commission on Judicial Performance, April 3, 2003, http://cjp.ca.gov/CNCensureRTF/McGraw%204-3-03.rtf (); David Ashenfelter, Removal Suggested for Judge, Detroit Free Press, February 11, 2003, available at 2003 WL 2542382 (judge used court computers to visit pornographic Internet sites).

have sex with bailiffs,[209] secretaries,[210] law clerks,[211] court reporters,[212] paroled felons,[213] and spouses of defendants awaiting sentencing.[214]

Bad judges are seduced by publicity. Some serve as their own press agents.[215] Others act star-struck. California judge Judith C. Chirlin presided over a celebrity trial in which Main Line Cinemas accused actress Kim Basinger of breach of contract for backing out of the movie "Boxing Helena." After the studio prevailed at trial, and while the case was on appeal, Judge Chirlin attended the premiere of the movie and post-premiere reception as a guest of the plaintiff.[216] Comments to the media can also be a trap, as federal district judge Penfield Jackson discovered when the court of appeals ruled

[207] *See* Robert Becker, State Ousts Judge, Cites Harassment, Chicago Tribune, December 4, 2001, available at 2001 WL 30798221 (after leafing through lingerie catalog, judge showed it to female state's attorney and asked, "what do you think of this one?").

[208] Jean Guccione, Judge's Outside Contact With Victim Questioned, Los Angeles Times, November 18, 2000, available at 2000 WL 25919439 (judge asked rape victim to dinner after sentencing her attacker to life in prison).

[209] *See* Lyda Longa, Prosecutor Finishes Inquiry of Judge, Tampa Tribune, May 2, 2001, available at 2001 WL 5501151 (grand jury criticized a judge for having affair with bailiff).

[210] *See In re Keith E. Campbell*, No. 87 CC-3, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge had a long-standing personal, romantic and sexual relationship with his judicial secretary and fired her when she discontinued the relationship).

[211] *See In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law, in Relation to Robert N. Going, a Judge of the Family Court, Montgomery County*, New York State Commission on Judicial Conduct, December 29, 2000, available at http://www.scjc.state.ny.us/Determinations/G/going(2).htm (judge had affair with his law clerk).

[212] *See In re Oliver Spurlock*, No. 98 CC-1, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge had sex in chambers with court reporter).

[213] *In re Harris*, 713 So.2d 1138 (Louisiana 1998) (judge had an extramarital affair with a felon who was released on parole pursuant to a sentence that the judge herself had imposed).

[214] *See* Jurist Disqualifies Self in Ex-Judge's Case, Los Angeles Times, October 3, 2000, available at 2000 WL 25903128 (judge had sexual relations with the wife of a defendant who was awaiting sentencing in his court on kidnapping charges).

[215] *See In re Samuel G. Harrod, III*, No. 80 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge massm ailed news clips, press releases, and other materials using the county postage machine for franking).

[216] *See Public Admonishment of Judge Judith C. Chirlin*, August 28, 1995, California Commission on Judicial Performance, http://cjp.ca.gov/PubAdmRTF/ChirlinPA_08-28-95.rtf.

that he had committed judicial misconduct by speaking to reporters about the government's antitrust case against Microsoft.[217]

Judges sometimes treat their courtrooms as personal space. One judge displayed a crucifix in his courtroom.[218] Another distributed religious literature to jurors.[219] A New York judge reportedly made arrangements for his grandson's *bris* over the telephone in open court with a jury seated and a witness on the stand.[220] Several judges brought loaded revolvers to court.[221] One Arkansas judge was in the habit of leaning back in his chair, putting his feet on the desk, and spitting chewing tobacco into a cup.[222] An Oklahoma judge allegedly ate raw hamburger on the bench.[223] The bench caneven be an opportunity to catch up on sleep.[224]

Sometimes, judges act out of what they conceive to be high spirits or a sense of fun. A California judge sang to criminal defendants, explaining that she had a "happy heart."[225] Another maintained a "joking relationship" with a court administrator

[217] See *United States v. Microsoft Corp.*, 253 F.3d 34, 107-17 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).

[218] *See Inquiry Regarding Jose Angel Velasquez*, California Commission on Judicial Performance, April 16, 1997, available at http://cjp.ca.gov/CNCensureRTF/VelasquezCNCN_04-16-97.rtf.

[219] *In re Empson*, 562 N.W.2d 817 (Nebraska 1997).

[220] Voting No on Elected Judges, New York Daily News, December 2, 2001, available at 2001 WL 27989053.

[221] *See In the Matter of Breitenbach*, 482 N.W.2d 54 (Wisconsin 1992) (judge left a loaded revolver in a courtroom wastebasket); NY Board Wants Gun-Toting Judge Gone, AP Online, August 18, 1999, available at 1999 WL 22034995 (judge carried a gun under his robes).

[222] Notwithstanding that such conduct fits a cultural stereotype of how country judges ought to behave, the state's Judicial Discipline and Disability Commission concluded that it was subject to admonishment for failing to maintain courtroom dignity. *In re Judge Steve Inboden*, March 15, 1999, available at http://www.state.ar.us/jddc/pdf/sanctions/Inboden1.273.PDF.

[223] John Greiner, Judges Can Face Ouster From Bench, Daily Oklahoman, December 30, 2002, available at 2002 WL 103885756.

[224] *In the Matter of Carpenter*, 17 P.3d 91 (Arizona 2001) (judge attempted to excuse his sleeping on the bench as due to narcolepsy).

[225] Stuart Pfeifer, Commission Chides Orange County Judge, Los Angeles Times, June 27, 2000, available at 2000 WL 2254972.

involving numerous incidents of pranks and sexual banter.[226] A Nevada judge played "Jail House Rock" and other prison-themed songs to suspects awaiting arraignment.[227] A Nebraska judge lit off fireworks in a colleague's bathroom.[228] A California judge had a deputy sheriff handcuff the court interpreter as a joke punishment for lateness.[229] Still another judge, upon learning the defendant had a snake phobia, introduced a rattlesnake head into his cell, triggering an anxiety attack.[230]

Lack of Candor. Bad judges are untruthful. They fabricate their backgrounds in order to obtain their appointments,[231] fail to be forthright in applications for service on the bench,[232] are evasive in responding to required periodic disclosures of financial transactions and interests,[233] neglect to inform the authorities about criminal convictions,[234] and misrepresent the status of their dockets in order to avoid

[226] *See Inquiry Concerning Judge John B. Gibson*, California Commission on Judicial Performance, January 28, 2000, available at http://www.cjp.ca.gov/PubAdmRTF/GibsonPA_01-28-00.rtf (judge wrote a memo offering to "cancel all of the appointments to reverse my vasectomy to have a meeting with you to implement new procedures").

[227] *In the Matter of the Honorable Gary J. Davis*, Case No. 9502-107 (Nevada Commission on Judicial Discipline, December 1995), available at http://www.judicial.state.nv.us/davisfindings.htm.

[228] *In re Jones*, 581 N.W.2d 876 (Neb. 2000).

[229] *Inquiry Concerning Former Judge Arthur S. Block*, December 9, 2002, available at http://cjp.ca.gov/CNCensureRTF/Block%20Decision%2012-09-02.rtf.

[230] *In re Honorable Gary T. Friedman*, California Commission on Judicial Performance, June 21, 1993, available at http://www.cjp.ca.gov/PubReprovals/Friedman_PubR_062193.doc.

[231] *See Inquiry Concerning Judge Patrick Couwenberg*, California Commission on Judicial Performance, August 15, 2001, available at http://www.cjp.ca.gov/CN%20Removals/CouwDecision_sign.doc (judge falsely claimed that he was a graduate of CalTech, a former CIA operative, and a wounded war veteran).

[232] *See, e.g*., Maurice Possley and Ken Armstrong, Clamor Grows Over Associate Judge Circuit Chief Says Hynes' Ability to Be Fair, Chicago Tribune, November 11, 1999, available at 1999 WL 2931236 (judicial candidate failed to disclose that he had committed racial discrimination in jury selection in murder case when serving as public prosecutor).

[233] *See, e.g*, *In re Lambros J. Kutrubis*, No. 99 CC-3, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge knowingly failed to disclose loans and lawsuits in statement required for members of the judiciary in Illinois).

[234] *See* Richard Marosi, State Panel Rebukes O.C. Judge in DUI Case, Los Angeles Times, June 21, 2000, available at 2000 WL 2253261 (judge admonished for failing to report DUI conviction to failing to report his state Commission on Judicial Performance).

acknowledging backlogs.[235] When accused of misconduct, they lie to the police,[236] the press,[237] and disciplinary authorities.[238] They fail to cooperate with investigators, [239] behave in a contumacious manner in formal misconduct hearings,[240] and intimidate,[241] suborn,[242] or retaliate against[243] witnesses.

Electioneering and Purchase of Office. Bad judges engage in inappropriate

[235] *See In the Matter of Judicial Disciplinary Proceedings Against Dreyfus*, 182 Wis.2d 121, 513 N.W.2d 604 (1994) (judge submitted false certificates of status of pending cases); *Inquiry Concerning Johnson*, 692 So.2d 168 (Florida 1997)(judge repeatedly backdated DUI convictions in order to disguise how long she was taking to dispose of cases); *In the Matter of Waddick*, 232 Wis.2d 733, 605 N.W.2d 861 (2000) (judge falsely certified that he was up-to-date with his docket when in fact he was behind on numerous cases).

[236] *See In the Matter of Michael R. Connor*, 589 A.2d 1347 (N.J. 1991) (judge gave evasive answers to officers during traffic stop).

[237] *See Inquiry Concerning Former Judge Vincent J. McGraw*, California Commission on Judicial Performance, April 3, 2003, available at http://cjp.ca.gov/CNCensureRTF/McGraw%204-3-03.rtf (judge lied to the press when asked whether he viewed pornography on his courthouse computer).

[238] *See, e.g*., *In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Reynold N. Mason, a Justice of the Supreme Court, 2nd Judicial District, Kings County* , New York State Commission on Judicial Conduct, June 21, 2002, available at http://www.scjc.state.ny.us/Determinations/M/mason.htm (judge failed to cooperate with investigation and gave testimony that was evasive and incredible); David Weber, Lopez Inks Pact to Officially End Probe, Boston Herald, June 7, 2003, available at 2003 WL 3027425 (judge lied during the hearing and the investigation into her alleged misconduct); New Hampshire Panel Admonishes Chief Justice Brock, Los Angeles Times, April 22, 2001, available at 2001 WL 2480657 (justice of state supreme court lied to investigators during impeachment inquiry).

[239] *See, e.g*., *In re Keith C. Campbell*, No. 87 CC-3, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge suspended for offenses including failing to cooperate with investigators).

[240] *See Inquiry Concerning Campbell*, 426 S.E.2d 552 (Georgia 1993) (judge removed more than $15,000 in public moneys from the magistrate's court); *In the Matter of the Honorable Gary J. Davis*, Case No. 9502-107, Nevada Commission on Judicial Discipline, December 1995, available at http://judicial.state.nv.us/davisfindings.htm (at formal hearing on disciplinary charges, judge wrongfully refused to answer non-incriminating questions posed by special counsel and behaved in contumacious and contemptuous manner).

[241] David Ashenfelter, Removal Suggested for Judge, Detroit Free Press, February 11, 2003, available at 2003 WL 2542382 (judge accused of filing lawsuits against nine witnesses who were scheduled to testify against him in judicial disciplinary proceedings); *In the Matter of Drury*, 602 N.E.2d 1000 (Indiana 1992)(judge attempted to intimidate ex-girlfriend and her mother who were cooperating with investigation of judicial misconduct); *Inquiry Concerning Former Judge Arthur S. Block*, December 9, 2002, available at http://cjp.ca.gov/CNCensureRTF/Block%20Decision%2012-09-02.rtf (judge attempted to intimidate several witnesses during investigation into judge's alleged sexual misconduct).

[242] *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995) (judge asked material witnesses not to cooperate with agents and not to discuss a loan given to the judge).

[243] *See In re Samual G. Harrod, III*, No. 80 CC-2, Illinois Judicial Inquiry Board, available at http://www.state.il.us/jib/summary.htm (judge sent an anonymous letter to the estranged wife of the prosecuting attorney suggesting lines of investigation she might use in her divorce case and caused bogus magazine subscriptions to be mailed to members of the judicial inquiry panel).

political conduct.[244] They volunteer for partisan activities while on the bench[245] and dispense lucrative appointments in order to curry favor with party leaders.[246] Judges, law clerks and other courthouse workers who owe their appointments to party patronage are expected to attend expensive fundraising dinners for the dominant political party.[247] Some judges simply buy their nominations. In Brooklyn, the Democratic Party leadership reportedly sold judgeships for $50,000, with the bribes being distributed up and down the party food chain.[248] Suspicion of purchase of office also arises when judges pay "consultation fees" to politically connected firms at the request of party leaders.[249]

Where party nomination alone is not sufficient to guarantee victory, judges need cash and volunteers in order to conduct their campaigns. Sometimes, judges violate legal

[244] Usually, the office in question is another judgeship (or retention in the judge's current position). Sometimes, however, judges seek to use their judicial posts as a springboard for higher office. One Delaware judge who publicly announced that he was seeking the Republican nomination for Governor without resigning his judicial seat received instead a censure and removal from office by the Delaware Court on the Judiciary. *In the Matter of Buckson*, 610 A.2d 203 (Delaware Court on the Judiciary 1992).

[245] *See, e.g.*, *In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to Ira J. Raab*, New York State Commission on Judicial Conduct, February 3, 2003, available at http://www.scjc.state.ny.us/Determinations/R/raab.html (judge participated as a panelist in a political party's screening interviews of political candidates, appeared at the party's "phone bank" for a candidate for the county legislature and made phone calls on behalf of the candidate).

[246] See text accompanying notes __ - __ *supra*.

[247] Party fundraising through courthouses is well-developed in New York State. In Queens New York, nearly 40% of the Democratic Party's annual revenue comes from courthouse donations. *See* Clifford J. Levy, Where Parties Select Judges, Donor List is a Court Roll Call, New York Times, August 18, 2003, at A1, B2. In Brooklyn, the Democratic Party boss issued a command invitation to judicial candidates to attend a $500/head "preprimary cocktail party." Nancie L. Katz, B'klyn DA Flags Dems, New York Daily News, August 27, 2003, at 25.

[248] Kati Cornell Smith and Tom Topousis, Feds Probe Jailed Pol's Role in 50G 'Bench Buy,' New York Post, July 10, 2003, at 7.

[249] *See* Nancie L. Katz, Judge Trio Forced to Ante Up 100G?, New York Daily News, July 16, 2003, available at 2003 WL 58595493 (three candidates for judgeships in Brooklyn, New York were reportedly strong-armed to pay $100,000 each to a politically-connected consulting firm as the price for retaining the nomination); Supporter of Elian Was Paid by Judge, Los Angeles Times, January 12, 2000, available at 2000 WL 2200009 (judge paid prominent figure in Miami politics substantial "consulting fees" during her election campaign).

limits on contributions.[250] Even if they stay within the law, there is a perhaps-unavoidable suspicion that they will favor those who provided campaign help.[251] Judges running for office may also wish to promote themselves in the public eye and to take positions on politically controversial issues. Whether or not such activities constitute a person as a bad judge, they are subject to discipline in many jurisdictions[252] (although a state's power to impose a sanction is constrained by the first amendment).[253]

II. The Policy Tradeoff

Fundamental to the American system of government is the proposition that the judicial branch should be independent from the political branches of government.

[250] *See* Martha Carr, Green Gave Contribution Back, Says Treasurer, New Orleans Times-Picayune, September 123, 2002, available at 2002 WL 25255002 (judge returned illegal campaign contribution from bail bond company after being caught on videotape accepting an envelop filled with cash from a company employee).

[251] For outraged criticism of the process, *see* David Barnhizer, 'On the Make': Campaign Funding and the Corrupting of the American Judiciary, 50 Catholic Law Review 361, 369 (2001) (the system of campaign contributions has legalized a "corrupt process" in which lawyers "make payments to judges before whom they practice and the payments are legitimated by labeling them as campaign contributions.").

Whether campaign contributions actually influence case outcomes is unclear. For a report suggesting that such evidence is lacking, at least at the appellate level, *see* Ronald D. Rotunda, A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates, Professional Lawyer (Winter 2003) (examining Illinois, Michigan and Wisconsin). The lack of a correlation in these studies does not necessary mean that campaign contributions had no influence, however. If lawyers know or believe that contributions will influence judges, and also know of the contributions made by other lawyers, this knowledge may influence which cases are selected for litigation. *See, e.g.,* Daniel Kessler, Thomas Meites & Geoffrey Miller, Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. Legal Studies 233 (1996); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 Journal of Legal Studies 1 (1984).

[252] State codes of judicial conduct tend to discourage public statements by judicial candidates. *See* Michael R. Dimino, Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians, 21 Yale Law & Policy Review (2003).

[253] See *Republican Party v. White*, 536 U.S. 765 (2002) (holding that the first amendment prohibits the states from gagging judicial candidates on issues of public debate). For discussion, see Michael R. Dimino, Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians, 21 Yale Law & Policy Review (2003) (concluding that judicial campaign speech should be entitled to a high level of protection under the first amendment). An important test of the ability of the government to restrict political campaign speech by judicial candidates is now underway in New York, where Supreme Court Justice Thomas J. Spargo has been accused of violating the state's code of judicial conduct by overtly partisan political statements during his campaign for a judicial seat. *See Spargo v. New York State Commission on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003) (striking down state judicial conduct regulations that prohibited judicial candidates from engaging in political activity and requiring candidates to promote confidence in and the integrity of the judiciary).

Independence safeguards the public against governmental oppression or expropriation and protects against corruption of the administration of justice by private interests. At the same time, judges wield enormous authority including the power of judicial review. Accordingly, their independence cannot be unlimited. They must be accountable to the public through some type of democratic process. The tradeoff between independence and accountability is unavoidable[254] and forms a central problematic for American constitutional theory.[255]

Less commonly recognized is a different set of tradeoffs involving quality of judicial action. Judicial independence requires that judges be insulated from oversight and control by parties outside of the judicial branch.[256] Thus judges serve for substantial terms of office, may not be removed except for gross misconduct, and (at least at the federal level) enjoy protection against diminution in their salaries. The expression of judicial independence has gone even beyond the concept that the judicial branch must be protected against intrusions by the political branches. In practical implementation, it

[254] *See* Paul Carrington, Judicial Independence and Democratic Accountability in Highest State Courts, 61 Law & Contemporary Problems 79 (1998). The tension between these values may be less severe than might be predicted by pure theory. *See, e.g.*, Bruce Fein and Burt Neuborne, Why Should We Care About Independent and Accountable Judges, 84 Judicature 58, 61-62 (2000) (cataloging various democratic checks on judicial action).

[255] Classic treatments of the problem are Alexander M. Bickel, The Least Dangerous Branch (1962) (criticizing power of judicial review); Herbert Weschler, Toward Neutral Principles of Constitutional Law, 73 Harvard Law Review 1 (1959) (reconciling independence and accountability through concept of neutral principles as a minimal constraint on constitutional adjudication). Recent treatments of the problem include Larry D. Kramer, The Supreme Court 2000 Term Foreword: We The Court, 115 Harvard Law Review 4 (2001) (criticizing concept of judicial supremacy in constitutional interpretation); Barry Friedman and Anna L. Harvey, Electing the Supreme Court, 78 Indiana Law Journal 123 (2003) (arguing that judicial review is generally consistent with intent of sitting Congress); Barry Friedman, The Birth of an Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale Law Journal 153 (2002) (chronicling academic treatment of the tension between independence and accountability).

[256] For discussion, *see, e.g.*, John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 Southern California Law Review 353 (1999); Pamela S. Karlan, Two Concepts of Judicial Independence, 72 Southern California Law Review 535 (1999); Alex Kozinski, The Many Faces of Judicial Independence, 14 Georgia State University Law Review 861 (1998); Judith S. Kaye, Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts, 25 Hofstra Law Review 703 (1997).

entails granting trial courts substantial autonomy even from oversight and control within the judicial branch.[257] American trial judges are satraps with powers small in extent but vast within the ambit of their potency.

The independence of American trial judges interacts in a complex way with the quality of their work product. On the one hand, independence is itself a quality-enhancing policy. If judges are not independent, they will be subject to influence that could distort the outcomes of cases, skew the development of substantive law, and detract from public confidence in the judicial system. Along this dimension, independence is positively correlated with quality. On the other hand, independence also comes with a cost. Power unchecked becomes power abused. A corporate executive who performs badly can be penalized by receiving lower compensation or suffering a demotion, and must be prepared to receive criticism from others in a team setting. But in a world of perfect judicial independence, such constraints would not apply to trial judges. Even if they perform badly, they would still receive deference from lawyers who appear before them, would still retain the status, salary, and perquisites of office, and would still be emperors of their small domains. Human beings in robes,[258] judges shirk when they can get away with it.[259]

Accountability also interacts with quality of judicial action. Like independence, accountability is partially justified as a performance-enhancing measure. It provides a method for penalizing judges who provide poor service to the public. Judges who are

[257] *See, e.g., Urquhart v. Davis*, 19 S.W.3d 21 (Ark. 2000) ("independence of the bench in our judicial system requires that the trial judge control his docket and the disposition of matters filed").

[258] *See* Richard Posner, What Do Judges Maximize? The Same Thing as Everyone Else, 3 Supreme Court Economic Review 1 (1993) (judges value prestige, leisure, reputation, and deference from others, among other things).

[259] *See* Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 Journal of Financial Economics 305 (1976).

known to be corrupt, abusive, or biased can be voted out of office; and those who are unqualified may not be elected. Accountability also provides a democratic check in the substantive development of the law, at least at the higher levels of the judiciary. A judge who is too liberal or too conservative, too coddling of criminals or too favorable toward the prosecution, can face criticism for those decisions and possible sanction from the voters.

At the same time, the value of accountability can harm quality. If judges were completely "accountable" in a political sense, they would become passive tools of the popular will. The coherence, consistency, and durability of legal rules would be threatened, and protection of minority rights undermined. Moreover, with accountability comes politics, and with politics comes electioneering, influence-peddling, interest groups, patronage and corruption. Thus accountability too is a double-edged sword as far as quality is concerned.

The problem for public policy is to devise structures of governance and authority that minimize the total costs associated with these parameters.[260] It should be evident that there is no corner solution. We cannot afford to sacrifice any one of these values in order to enhance the others. Any sensible policy will seek to preserve a substantial level of each. The issue is how to structure a cost-effective mix of strategies taking account of all the competing values.

III. Existing Approaches

[260] As well as others, such a efficiency, which would need to be considered in an complete theory of judicial organization.

Any solution to the problem of bad judges, all agree, lies in the process of selection, retention, supervision and removal.[261] The options fall into three broad categories: case-specific public remedies; systemic publicremedies; and p rivate remedies.

A. Case-Specific Public Remedies

Impeachment. Impeachment is the traditional means for dealing with offending judges. It was the sole mechanism in the states until the advent of judicial disciplinary commissions in the 1960s[262] and remains the only way to remove a federal judge.[263] Impeachment has the value that it is a well-recognized, traditional method for disciplining bad judges. If grounded in a constitution, it poses no problems under doctrines of separation of powers. It is also a high-profile process with significant opportunities for public participation and input.

Impeachment is not a satisfactory solution to the problem of bad judges, however. Legislators usually don't want to get involved in the impeachment business, which is distracting and offers few political payoffs. The only recent judicialimpeachments of note in the states were those of New Hampshire Justice David Brock in 2000 (which resulted in an acquittal)[264] and Pennsylvania Supreme Court Justice Rolf Larsen in 1993 (which resulted in a conviction).[265] At the federal level, only three federal judges have

[261] For the classic study, *see* Evan Haynes, The Selection and Tenure of Judges (1944). A recent study is Reports of the Task Forces of Citizens for Independent Courts, Uncertain Justice: Politics and America's Courts (2000).

[262] *See, e.g*., http://www.alalinc.net/jic/docs/jicfy2001.pdf (Alabama Judicial Commission established in 1972; previously, only remedy was impeachment).

[263] *See* U.S. Const. Art. III, § 1 (federal judges serve during "good behavior); *id.* Art. I, § 2, cl. 5 (procedures for impeachment).

[264] *See* Holly Ramer, Judges Criticized for Aiding Boss, AP Online, April 26, 2001, available at 2001 WL 19779728.

[265] *See* Jerome C. Meites and Steven F. Pflaum, Justice James D. Heiple: Impeachment and the Assault on Judicial Independence, 29 Loyola University of Chicago Law Journal 741 (1999) (describing

been impeached in the past half century: Harry E. Claiborne, Alcee L. Hastings and Walter L. Nixon.[266] Each was convicted and removed. The relatively small number of impeachments suggests that the remedy is ineffective as a general approach to the bad judges problem.[267] Impeachment, moreover, is an all-or-nothing remedy: a judge is either convicted and removed, or acquitted and allowed to remain in office. These polar choices limit the possibilities for administering sanctions short of removal in cases where the judge's conduct is subject to censure but not of sufficient gravity to warrant the constitutional penalty.[268]

Impeachment inevitably threatens judicial independence. Although in recent times judges have not been impeached for overtly political reasons, this has not always been the case. The impeachment of U.S. Supreme Court Justice Samuel Chase was partially an effort by political adversaries to destroy a hated rival.[269] Politically motivated demands to impeach Chief Justice Earl Warren were heard during the 1960s,[270]

Larson case). A committee of the Illinois House of Representatives investigated impeachment charges against Chief Justice James D. Heiple in 1997 but recommended that no action be taken. *See id.*

[266] *See* Jonathan Turley, The Executive Function Theory, The Hamilton Affair, and Other Constitutional Mythologies, 77 North Carolina Law Review 1791, 1834-1837 (1999) (providing a history of federal judicial impeachments).

[267] The raw number of impeachments, however, does not tell the full story because judges may resign to avoid impeachment. See *See* Jonathan Turley, The Executive Function Theory, The Hamilton Affair, and Other Constitutional Mythologies, 77 North Carolina Law Review 1791, 1837-1841 (1999) (describing instances where federal judges resigned rather than face impeachment).

[268] The formal restriction on sanction, however, is not quite as severe a limitation as may appear at first blush. Even if a judge is not convicted, an impeachment is a black mark to be avoided if possible. And even if the investigating body does not refer an impeachment to the trier of fact, it may issue a report scathing the judge, as happened in Illinois during the investigation into charges against Chief Justice Heiple. *See* Jerome C. Meites and Steven F. Pflaum, Justice James D. Heiple: Impeachment and the Assault on Judicial Independence, 29 Loyola University of Chicago Law Journal 741 (1999) (reproducing Illinois House committee report recommending against impeachment).

[269] *See* William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992) (Chase impeached in part because he attempted to enforce Sedition Act).

[270] *See* Charles J. Ogletree, Jr., Judicial Activism or Judicial Necessity: The D.C. District Court's Criminal Justice Legacy, 90 Georgetown Law Journal 685, 693 (2002) (discussing John Birch Society's campaign to impeach Chief Justice Warren).

and candidates continue to call for impeachment of judges who issue unpopular decisions.[271]

Impeachment is limited to gross misconduct.[272] It is not an effective remedy for dealing with judges who are incompetent, irritable, or ideologically biased, nor does it address cases of private misconduct by judges unless the offenses are severe. Impeachment, moreover, works only for judges in high positions (such as the jurisdiction's supreme court); it does not work for the low-level posts where bad judging is most frequently observed.

Recusal and Disqualification. Another remedy is for the concerned party to seek a judge's removal from the case. The basis for such removal could be either recusal or disqualification. Disqualification tends to be based on relatively precise criteria, is nondiscretionary, and in general cannot be waived by the parties. Recusal is a more generalized obligation or power of a judge to remove herself for a specified reason or even for no reason at all.[273]

Recusal and disqualification are useful remedies for certain types of bad judging. They can be effective at screening out judges who have a financial or personal interest in the litigation. They can also police, albeit imperfectly, against judges whose involvement

[271] Presidential candidate Robert Dole called for the impeachment of federal judge Harold Baer after the latter suppressed evidence seized by police in a traffic stop. *See, e.g.*, Joan Biskupic, Hill Republicans Target 'Judicial Activism'; Conservatives Block Nominees, Threaten Impeachment and Term Limits, Washington Post, September 14, 1997, available at 1997 WL 12886568.

[272] *See* Paul S. Fenton, The Scope of the Impeachment Power, 65 Northwestern University Law Review 719 (1970) (surveying history of judicial impeachments and concluding that the "only generalization that can safely be made is that an impeachable offense must be serious in nature").

[273] Federal standards for recusal and disqualification are codified in 28 U.S.C. §§ 144 and 455. State grounds can be contained in the state constitution, *see, e.g.*, Texas Constitution, Article V, § 11, an applicable statute, *see, e.g.*, Cal Code Civ. Proc., § 170.1, or a rule of court, *see, e.g.,* Texas R. Civ. Pro. 18.b(2). Also relevant are applicable codes of judicial conduct. While these codes will not usually provide independent grounds for recusal or disqualification, they are persuasive. *See, e.g.*, *State v. Baker*, 539 S.W.2d 367, 372 (Tex. Civ. App. 1976, no writ) (judicial ethics code persuasive but not controlling on question of recusal).

in a case has become overly personal or adversarial. However, recusal and disqualification are far from a complete solution to the bad judges problem.

Recusal and disqualification are simultaneously over-inclusive and under-inclusive. They can operate rigidly and thus exclude judges whose interest in a case cannot plausibly result in prejudice against a party.[274] To the extent recusal and disqualification are over-inclusive, they can impose unnecessary costs and delay on the administration of justice, and can be used by parties for strategic purposes rather than to protect a bona fide interest in avoiding biased results. Even more problematically, recusal and disqualification do not exclude judges in many situations in which a party might legitimately want a case tried before a different judge. For example, a lawyer might suspect a particular judge of being corrupt, but have no hard evidence to back this up. Mere suspicion of corruption would not provide grounds for recusal and if mentioned at all might land the attorney in trouble.[275] Recusal and disqualification are not available to challenge a judge on grounds that she is incompetent or dilatory. Nor will these procedures provide a basis for removing a judge who is waspish or ill-tempered so long as the abuse is dispensed on an evenhanded basis. They offer little help for litigants before judges who display poor judgment or inappropriate behaviors. They do nothing about judges who abuse their positions for personal gain or who behave in their personal lives in ways reflecting adversely on their capacity in office

[274] *See, e.g.,* Ziona Hochbaum, Note, Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Holdings, 71 Fordham Law Review (2003) (describing a case in which a federal judge would have to disqualify herself even if her stake in the outcome of a case was one penny).

[275] The attorney might even face a citation for contempt. *See, e.g.*, *Laughlin v United States*, 151 F.2d 281 (D.C. Cir.), cert denied, 326 U.S. 777 (1945) (upholding contempt citation against attorney who sought disqualification of trial judge on the ground that the President had picked the judge in order to secure a conviction).

Recusal and disqualification do not even address many cases where the judge might in fact be prejudiced. Judges known to favor a particular ideological point of view are not subject to recusal for that reason alone, even when the case before them implicates the very values for (or against) which the judge has fought during her professional life. Animosity or partiality developed in a proceeding will also generally not be a sufficient ground for exclusion.[276] Even if a trial judge has displayed hostility towards a party or her attorney, this fact alone would not be sufficient to require recusal unless it evidences such deep-seated bias or antagonism as to make fair judgment impossible. Recusal is also not generally required merely because the judge has accepted campaign contributions from an attorney or litigant.[277]

Recusal and disqualification place the initial decision in the very judge whose removal is sought. There is always a risk that the judge will resent having her impartiality questioned. If the judge does take umbrage and refuses to recuse, the party who sought disqualification may face hostility for the remainder of the trial.[278] Because denials of motions to recuse or disqualify are interlocutory, the losing party may have no appeal until after a judgment on the merits.[279] Even then, the standard of appellate

[276] The extrajudicial source doctrine provides that except in extraordinary circumstances, recusal is not required when the only basis on which removal is sought is events occurring in the judicial process. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (holding the extrajudicial source doctrine applicable to recusal of federal judges).

[277] For a notorious example, *see Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 843 (Tex. App. 1987, no writ) (judge did not recuse even though trial counsel had contributed $10,000 to his campaign fund after the lawsuit was filed).

[278] *See* Roger M. Baron, A Proposal for the Use of a Judicial Peremptory Challenge System in Texas, 40 Baylor Law Review 49, 57-58 (1988) (judges can become enraged if parties challenge their impartiality).

[279] *See Lopez v. Behles*, 14F.3d 1497, 1499 (10th Ci r.), cert. denied, 513 U.S. 818 (1994) (denial of motions to recuse are interlocutory and not immediately appealable). *But see Durhan v. Neopolitan*, 875 F.2d 91, 96-96 (7th Cir. 1989) (denials of motions to recuse may not be appealed after final judgment). However, as discussed below, the appellate court might grant a discretionary interlocutory appeal or might grant the moving party a writ prohibiting the challenged judge from taking further action on the case. *See Long Term Credit Bank of Japan v. Superior Court of Guam*, 2003 WL 21135713 (Guam 2003) (granting

review is usually the deferential "abuse of discretion" test.[280] Recusal is thus a high-risk strategy because of the danger it will be refused. Motions to recuse, moreover, are not seemly proceedings; they focus the attention of the judge (and sometimes the public) on the judge's own failings and biases. They do not enhance public confidence in the legal system.

Appeal. The right of appeal can correct some of the mistakes of bad judges and acts as a deterrent against judges making improper rulings in the first place. Appeals can have the additional virtue of generating a public decision by the appellate tribunal which can embarrass a bad judge and bring public attention to his or her deficiencies, as well as warning other judges of the fate that awaits them if they make similar mistakes. Appeals also preserve judicial independence because the correction of error occurs within the judicial branch.

The right of appeal, however, is only a partial and limited remedy for the problem of bad judges.[281] Appeals offer relief only when acts of bad judging go to the correctness of the decision under review. If a judge sexually harasses a staff member, commits an act of personal misconduct which reflects on capacity in office but does not impeach the decision in a particular case, or acts inappropriately on the bench in a way that does not relate to the merits of the decision being appealed, the right of appeal will provide no redress. Even if the judge makes an error due to incompetence, this may not be subject to correction on appeal if the standard of review is a deferential one such as abuse of discretion. Appeals are also costly and protracted, and many litigants may simply accept

peremptory writ restraining trial judge from scheduling further proceedings); text accompanying notes ____ *infra*.

[280] *See, e.g., Maez v. Mountain States Tel. & Tel., Inc*., 54 F.3d 1488, 1508 (10th Cir.1995) (abuse of discretion test applies to appeals from denials of motions to recuse).

a bad decision rather than incur the additional expense and uncertainty. Finally, the right of appeal is over-inclusive: while it picks up some bad judges, it also captures many adequate judges who simply make errors (as all judges do), or even good judges who decide issues of first impression in a different way than the appellate court. Although reversal on appeal does provide some information about the capacities of the lower court judge, it is a noisy signal that cannot reliably separate good judges from bad.

Mandamus. Another method for controlling bad judges is through a writ of mandamus or other extraordinary relief.[282] Mandamus can be most helpful as a check on trial judges who improperly deny recusal or disqualification motions. The ordinary procedure would be for a disappointed party to seek interlocutory relief from the appellate court. Given the difficult situation that a party faces if her motion to recuse or disqualify is refused, appeals courts generally recognize that a petition for mandamus is an appropriate way to challenge the trial court's denial of the motion.[283] Mandamus may also be useful in correcting other instances of bad judging when the trial court has clearly overstepped the bounds of her powers and adequate relief cannot be obtained through other means.[284]

The mandamus procedure, however, is hedged in by significant restrictions. Mandamus is not a proper remedy for trial court errors on the merits, or even for

[281] *See, e.g.,* Harry T. Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges, 87 Michigan Law Review 765 (1989).

[282] *See generally* Brent D. Ward, Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils, 1980 Brigham Young University Law Review 233 (1980).

[283] *See, e.g., United States v. Cooley,* 1 F.3d 985, 996 n. 9 (10th Cir. 1993); *In re School Asbestos Litigation*, 977 F.2d 764, 777-78 (3d Cir.1992). *But see In re City of Detroit*, 828 F.2d 1160, 1165-67 (6th Cir. 1987) (denying right to challenge denials of motions to recuse by petitions for a writ of mandamus).

[284] For example, an appellate court may issue a writ of mandamus when a trial judge egregiously delays action on a matter. *See, e.g., Urquhart v. Davis*, 19 S.W.3d 21 (Ark. 2000) (granting writ of mandamus upon finding that judge had no good cause to delay ruling on petitioner's motion for summary judgment).

incompetence. It does not address most instances of judicial misconduct and provides no remedy for judges who misbehave in their personal lives. Moreover, mandamus does not generally rectify harms that have already occurred unless the error is ongoing. When mandamus is available, the standard of review will usually be even more deferential than the "abuse of discretion" standard that applies on appeal.[285] Generally, the petitioner must show a clear and indisputable right to relief, as where the trial judge has committed a "clear" abuse of discretion or conduct amounting to a usurpation of authority.[286] These restrictions make mandamus a poor vehicle for dealing with the problem of bad judges generally.

Liability. Legal liability is another means by which the system could police against bad judges in a given case.[287] A judge who violates a cognizable legal right entitling a party to relief may be subject to a penalty that could provide a remedy for the right infringed, deter future misconduct, and embody a public censure of the judge's conduct.

Legal liability can punish and deter certain types of misconduct. Outside their judicial roles, judges are liable just as other citizens for torts, crimes, breaches of contract, and violation of statutory obligations.[288] Even within their judicial roles, judges

[285] *See Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995) (higher standard than abuse of discretion applies to mandamus petitions).

[286] *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989) (articulating standards for granting writ).

[287] For general discussion, *see, e.g.*, Peter H. Schuck, The Civil Liability of Judges in the United States, 37 American Journal of Comparative Law 655 (1989); Jeffrey M. Shaman, Judicial Immunity from Civil and Criminal Liability. 27 San Diego Law Review 1 (1990).

[288] For example, judges who engage in sexual harassment would ordinarily not be protected even if the misconduct was committed on courthouse property against a court employee *See, e.g., Forrester v, White*, 484 US 219 (1988) (administrative acts not generally within the scope of judicial immunity); *Antoine v. Byers & Anderson*, 508 U.S. 429, 435-36 (1993) (touchstone of judicial immunity is resolving of disputes among parties); *Archie v. Lanier*, 95 F3d 438 (6th Cir. 1996) (judge's sexual harassment of job applicants and litigants not protected by judicial immunity).

can be liable if they act outside of any colorable claim to jurisdiction,[289] if the opposing party seeks only equitable relief against a continuing course of wrongful judicial conduct,[290] or if the judge engages in criminality in office such as bribery or extortion.[291]

Legal liability, however, is far from a complete solution to the problem of bad judges. Much of the conduct in which bad judges engage does not fall into any well-recognized basis for liability. Judges do not owe fiduciary duties to litigants. They are not subject to personal liability if they have a conflict of interest in the proceeding. Similarly, judges owe no personally enforceable duties to avoid erroneous rulings. The remedies for judicial error are procedures for correcting the outcome of the ruling, not personal claims against the judge. Nor will a judge, ordinarily, be subject to legal liability for being rude or displaying inappropriate behavior on the bench.

Even if a judge's actions would be a basis for liability if performed by an ordinary person, judicial immunity shields the judge from liability for civil damages for acts undertaken in an official capacity,[292] even when the conduct is malicious or in bad

289 *See, e.g., Mireles v. Waco*, 502 U.S. 9, 11 (1991) (judges who undertake a purportedly judicial action in the complete absence of jurisdiction may not be protected against claims for damages). Thus, the judge described in text accompanying note __, supra, who made a citizens arrest and then held an unauthorized midnight proceeding in the police station could well have been liable for money damages.

290 *See Pulliam v. Allen*, 466 U.S. 522 (1984) (upholding grant of injunctive relief and award of attorneys fees against state magistrate for violations of federal civil rights). *Pulliam* was partially overruled by the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, codified at 42 U.S.C. §§ 1983, 1988 (providing that in § 1983 actions against judges for alleged constitutional violations, injunctive relief is not available if a declaratory judgment would be adequate).

291 *See Ex parte Virginia*, 100 US 339 (1880) (state judge not immune from prosecution for depriving citizens of federal civil rights); *United States v. Claiborne* 727 F.2d 842 (9th Cir.), cert. denied, 469 U.S. 829 (1984) (federal judge could be prosecuted for income tax evasion committed while in office); *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), cert denied, 459 U.S. 1094 (1983) (federal judge prosecuted for bribery and extortion committed while in office); Note, Bribery And Other Not So "Good Behavior": Criminal Prosecution As a Supplement To Impeachment of Federal Judges, 94 Columbia Law Review 1617 (1994).

292 *E.g., Forrester v White,* 484 U.S. 219, 225 (1988) (describing judicial immunity as "comparatively sweeping"); *Pulliam v Allen*, 466 U.S. 522, 529-536 (1984) (providing a history of judicial immunity).

faith.[293] The broad scope of judicial immunity is illustrated by *Mireles v. Waco*,[294] a classic bad judge case. The trial judge allegedly authorized law enforcement personnel to use excessive force in seizing an attorney who failed to appear at a calendar call. The Supreme Court held that even if excessive force had been used, it did not avail the plaintiff; the conduct in question was in aid of the court's jurisdiction and that was sufficient to establish the judge's immunity.

Discipline. Another approach to bad judges is to establish procedures for receiving allegations of judicial misconduct, screening and investigating such complaints, and imposing an appropriate sanction for verified offenses.[295] At the federal level, responsibility for disciplining judges falls to the Chief Judge of each circuit and to the circuit Judicial Councils. Under the Judicial Conduct and Disability Act of 1980,[296] any person may file a written complaint with the clerk of the relevant court of appeals containing a brief statement of the facts upon which the complaint is based. [297] The clerk is required to promptly transmit the complaint to the Chief Judge of the circuit as well as to the judge whose conduct is questioned. The Chief Judge screens the complaint and

[293] *See, e.g., Mireles v. Waco*, 502 U.S. 9, 11 (1991) (judicial immunity not overcome by allegations of bad faith or malice); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) ("immunity applies even when the judge is accused of acting maliciously and corruptly"). The rationale is that imposing exposure to damages liability would unduly interfere with a judge's independence of action. *See, e.g., Forrester v White,* 484 U.S. 219, 226 (1988) (concern for judicial "timidity" that would result if judges feared personal liability).

[294] 502 U.S. 9 (1991).

[295] In addition to formal discipline, these procedures can include informal mechanisms by which peer pressure may be applied to judges whose conduct falls short of expectations. *See* Charles Gardner Geyh, Informal Methods of Judicial Discipline, 142 University of Pennsylvania Law Review 243 (1993).

[296] Pub.L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c). Congress revisited the issue in 1990 by establishing the National Commission on Judicial Discipline and Removal, a body charged with investigating and studying the problems of disciplining and removing Article III judges and recommending potential reforms. Judicial Improvements Act of 1990, Pub.L. No. 101-650, tit. IV, § 410, 104 Stat. 5089, 5124.

[297] 28 U.S.C. § 372(c)(1).

either dismisses it,[298] finds that an appropriate corrective action has already been taken, or refers the matter to a special committee.[299] If the third option is chosen, a committee consisting of the Chief Judge and an equal number of circuit and district judges investigates the complaint and reports its findings to the Judicial Counsel of the circuit, which presumably then undertakes an appropriate intervention to redress the problem.[300]

All states and the District of Columbia have also created agencies tasked with articulating standards for proper judicial conduct[301] and investigating and sanctioning misconduct.[302] Commission members are drawn from the judiciary, the bar, and the general public.[303] In some states, the judicial conduct commission has only the power to recommend punishments (other than informal sanctions such as admonishments).[304] In other states the commission itself has sanctioning authority. In some cases, there are two commissions – one to investigate and prosecute complaints, the other to act in a judicial capacity to determine punishment.[305]

These judicial disciplinary bodies have significantly improved policing against bad judges. They maintain staff knowledgeable in disciplinary matters and professionally tasked with responsibility for maintaining the integrity and quality of the judicial system.

[298] Grounds for dismissal are that the complaint as not in conformity with the statute, is directly related to the merits, or frivolous. 28 U.S.C. § 372(c).

[299] 28 U.S.C. §§ 372(c)(2-4).

[300] 28 U.S.C. § 372(c).

[301] These commissions typically have the power to issue advisory opinions on matters of judicial ethics. *See, e.g*., http://www.alalinc.net/jic/docs/jicfy2001.pdf (Alabama Judicial Inquiry Commission).

[302] *See generally* Cynthia Gray, How Judicial Conduct Commissions Work (1999); http://www.alalinc.net/jic/docs/jicfy2001.pdf (Alabama Judicial Inquiry Commission); http://www.courts.state.wi.us/judcom/ (Wisconsin Judicial Commission).

[303] *See, e.g*., http://www.alalinc.net/jic/docs/jicfy2001.pdf (Alabama Judicial Inquiry Commission has seven members: 3 judges, 2 lawyers, and 2 non-lawyers); http://www.ajc.state.ak.us/CONDUCT.htm (Alaska Commission on Judicial Conduct composed of three judges, three experienced lawyers, and three members of the general public).

[304] *See, e.g.,* Joe Gyan Jr., Five to Take Seats on La. Judiciary Commission, Baton Rouge Advocate, December 19, 1998, available at 1998 WL 4923164 (Louisiana Judiciary Commission is allowed to make recommendations for sanctions, but the penalty is determined by the state supreme court).

Because they have available to them a wide range of possible sanctions, they are able to devise punishments suitable for the offense. Unlike other approaches to bad judges, their purview extends to the full range of problems of bad judging identified earlier in this paper.

However valuable their contribution, these bodies are not a complete solution to the bad judges problem. Partly because they do not report to any other governmental body, they are often charged with being overly lax and, in effect, captured by the judges they are purportedly policing.[306] Critics point out that state disciplinary commissions dismiss the vast majority of complaints filed without even holding a hearing.[307] When sanctions are meted out, they are usually minor: admonishments,[308] reprimands, reprovals,[309] censures,[310] or transfers to another court. The harshest sanction, dismissal

[305] In Illinois, the Judicial Inquiry Board investigations allegations of misconduct, while the Illinois Courts Commission decides guilt and punishment. Illinois Constitution, Art. VI, § 15(b) – (j).

[306] In some cases, the sanctioning body is comprised of judges, which can lead to the appearance of cronyism and conflicts of interest. In Illinois, for example, a Supreme Court Justice who was himself under investigation for misconduct appointed the chairman of the commission charged with administering sanctions for judicial misconduct. Mary Wisniewski, Watching the Watchdogs Watch: The JIB and Courts Commission, Chicago Lawyer, March 1999.

[307] *See, e.g.*, Thomas D. Williams, Confidential Justice for Judges; Complaints Handled Far From The Public Eye, Hartford Courant, April 4, 1999, available at 1999 WL 6357513 (Connecticut's Judicial Review Council dismissed 97% of complaints during its 17-year history). This low level of action on complaints is not due to any nefarious or improper motives on the part of the disciplinary commissions, but rather to the fact that the vast majority of complaints referred to these commissions are either frivolous or are simply attempts by disappointed litigants to reargue the correctness of decisions. *See* Jeffrey N. Barr & Thomas E. Willging, Decentralized Self- Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 University of Pennsylvania Law Review 25, 34 (1993) (empirical study finding that the vast majority of complaints against federal judges were frivolous or went to the merits).

[308] *See, e.g.*, Mary Wisniewski, Watching the Watchdogs Watch: The JIB and Courts Commission, Chicago Lawyer, March 1999 (38 judges privately admonished in one year); mhttp://www.state.ar.us/jddc/decisions.html (Arkansas Judicial Discipline and Disability Commission website reporting instances of admonishment).

[309] *See, e.g.*, http://www.cjp.ca.gov/pubdisc.htm (reporting on numerous instances of reprovals by the California Commission on Judicial Performance).

[310] *See* Two Judges Face Censure for Judicial Misconduct, Salt Lake Tribune, January 7, 1999, available at 1999 WL 3340968; Mary Wisniewski, Watching The Watchdogs Watch: The JIB and Courts Commission, Chicago Lawyer, March 1999 (Illinois Supreme Court judge censured for misconduct); *In the Matter of Honorable William McKimm*, Arkansas Judicial Discipline and Disability Commission,

from office, is rare.[311] State judicial disciplinary commissions are also seen as lacking the resources to act as effective enforcers. They typically operate with restricted budgets,[312] have limited full-time staffs,[313] and often do not employ full-time investigators.[314] Commission members serve on a near-volunteer basis, receiving only per diem and expense compensation.[315] Fair or not, the perception that these commissions are relatively toothless both undermines their authority and reduces their effectiveness at maintaining public confidence in the judicial system.

It would be possible to upgrade the potency of these commissions, for example by increasing their budgets or mandating more onerous sanctions. In some cases, increases in funding or powers could be beneficial. It is not clear, however, that such changes would always help. Increased budgets and staff have to be paid for somehow, either through taxes or cutbacks in other services. Further, as the size and budgets of these commissions increase, and as they get career staff, they themselves may become entrenched bureaucracies more devoted to maintaining their positions and perquisites than to maintaining the quality of the judicial system. There are also dangers with enhanced sanctions and standards of conduct. The judicial task is discretionary, and it

November 20, 1998, available at http://www.state.ar.us/jddc/pdf/sanctions/mckimm_97-284_final.pdf (censure for failing to handle cases in timely fashion and failing to cooperate with investigation).

311 *See* Thomas D. Williams, Confidential Justice for Judges; Complaints Handled far From the Public Eye, Hartford Courant, April 4, 1999, available at 1999 WL 6357513 (no dismissals in 17 years).

312 *See, e.g*., Thomas D. Williams, Confidential Justice for Judges; Complaints Handled Far From The Public Eye, Hartford Courant, April 4, 1999, available at 1999 WL 6357513 (total annual budget for Connecticut commission was $205,555); Mary Wisniewski, Watching The Watchdogs Watch: The JIB And Courts Commission, Chicago Lawyer, March 1999 (academic commentators recommend increased budget for judicial disciplinary agencies).

313 *See, e.g*., Timothy R. Brown, Increasing Number of Judges Being Judged in Miss. Courts, Baton Rouge Advocate, January 3, 2002, available at 2002 WL 5022306 (judicial commissions are hampered by budget shortfalls and may be unable to pay enough to attracted qualified professional staff).

314 *See* Thomas D. Williams, Confidential Justice for Judges; Complaints Handled Far From The Public Eye, Hartford Courant, April 4, 1999, available at 1999 WL 6357513 (Connecticut's commission employed no full-time investigators and spent an average of $1,000 per year on investigations).

315 *See, e.g*., http://www.alalinc.net/jic/docs/jicfy2001.pdf (Alabama Judicial Inquiry Commission).

could be inadvisable to chill the judge's exercise of judgment or her ability to control the conduct of litigation. Moreover, if sanctions become too severe or the standards for judicial conduct set too high, good judges may leave the bench in order to avoid the risk of being penalized for actions taken in good faith, and excellent candidates might be deterred from seeking to replace them.

Exacerbating the perception that judicial conduct commissions are too cozy with judges is the suspicion of the secrecy in which they operate. The federal statute requires that "all papers, documents, and records of proceedings relating to investigations . . . shall be confidential and shall not be disclosed by any person in any proceeding."[316] State commissions also typically meet in secret, unless the matter is deemed serious enough to warrant a public hearing.[317] They do not disclose the names of judges against whom complaints are filed unless the allegations result in a sanction.[318] The perception of excessive secrecy in these commissions might be addressed by measures mandating greater transparency. But if all complaints against judges were publicly disclosed, no matter how frivolous, the effects could be counterproductive: the dignity of the judiciary could be undermined, public confidence in the rule of law could be impaired, and judges

316 28 U.S.C. § 372(c)(14).

317 *See, e.g.,* Consider This, Syracuse Post-Standard, January 22, 2003, available at 2003 WL 5808824 (in New York, hearings of the Commission on Judicial Conduct are closed to the public); Jean Guccione, More Elected Than Appointed Judges Disciplined in '90s, Los Angeles Times, December 1, 2002, available at 2002 WL 103221370 (California proceedings are confidential).

318 *See, e.g*., Tom Schoenberg, Secretive Panel Has Job of Overseeing Judges, Legal Times, May 7, 2001, p. 15 (District of Columbia judicial oversight body keeps its deliberations secret and has never publicly disciplined a judge); Amy Joi Bryson and Bob Bernick Jr, Lawmakers Aim to Boost Judges' Accountability, Deseret News, January 30, 2003, available at 2003 WL 11718744 (In Utah, 94 percent of substantiated findings of judicial misconduct are never made public); Reprimanding Judges, Salt Lake Tribune, October 14, 2002, available at 2002 WL 4272065 (in Utah, the identities of judges who have been reprimanded are not publicly disclosed); Matthew Eisley, Voters in Dark About Judges' Ethical Records, Raleigh News & Observer, October 14, 2002, available at 2002 WL 11742420 (North Carolina Judicial Standards Commission reportedly handed out more than 100 private admonitions to judges, but has never released the substance of the charges nor the names of the sanctioned judges); Glenn Puit, ACLU Lawsuit: Secrecy of Judicial Complaints Targeted, Las Vegas Review-Journal November 22, 2002, available at 2002

could feel intimidated in the performance of their tasks. It may be that existing protections of confidentiality draw a reasonable line between competing policy considerations.

Finally, increasing the powers and authority of judicial disciplinary commissions carries a threat to judicial independence.[319] The inevitable conflicts between the commissions and judges under investigation can arouse suspicion that the commissions are acting in a vengeful or vindictive way.[320] The jurisdictions of these commissions can also spark problems. While it is appropriate for them to investigate allegations of judicial misconduct, it is out of bounds to criticize judges for the merits of decisions.[321] But the line between these two is always clear-cut.[322]

B. Public Systematic Remedies

Electoral Reforms. Numerous reforms have been proposed to improve the procedures for electing judges and thereby select better candidates for the bench.

One possible approach would be to reduce the influence of party leaders in selecting candidates for election to the bench.[323] Improvements in the nominating

WL 6883292 (in Nevada, even a person who files a complaint against a judge is prohibited from disclosing this fact).

[319] A point stressed in Steven Lubet, Judicial Discipline and Judicial Independence, 61 Law & Contemporary Problems 59 (1998). *See also* Martin Redish, Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis, 72 Southern California Law Review 673 (1999).

[320] *See, e.g.,* Frank Phillips, Judges Say Watchdog Tried to Foil an SJC Bid; Conduct Panel Sought Revenge, Jurists Say, Boston Globe, September 27, 1999, available at 1999 WL 6082569 (state judges charged that state judicial conduct commission attempted to sabotage a prominent judge's candidacy for Supreme Judicial Court).

[321] *See* Steven Lubet, Judicial Discipline and Judicial Independence, Law & Contemporary Problems 59 (1998) (arguing that judicial independence is most gravely threatened when judges face sanctions based upon the merits of a ruling).

[322] In California, for example, the state Commission on Judicial Performance filed charges (eventually dropped) against an appellate judge who announced in a dissent that as a matter of conscience he would refuse to follow a precedent of the state's Supreme Court. *See* Harriet Chiang, State Commission Drops Charges Against S.F. Judge/Rare Misconduct Allegation Over Judicial Opinion, San Francisco Chronicle, August 20, 1999, available at 1999 WL 2693771.

[323] New York again provides a lugubrious example of the extent of party leader influence in the judicial selection process. *See* Douglas Feiden, Trial and Error in Queens Courts, New York Daily News,

process, however, are unlikely to generate real results so long as the ultimate decision is left in the hands of the parties. New York law requires that the parties nominate judges at conventions.[324] The idea was that by opening the process to the public, nomination by backroom deal would be replaced with a more open and democratic system. In practice, the nominating conventions are little more than travesties. Bosses stack them with cronies whose sole responsibility is to rubber stamp the party's choices.[325] The delegates know nothing about the candidates and the convention itself takes less than an hour.

Another approach would be to prohibit political parties from publicly endorsing candidates for judicial elections. Such prohibitions are unlikely to survive attack under the first amendment.[326] Nonpartisan ballots, however, probably would survive constitutional scrutiny so long as political parties are not prohibited from supporting candidates outside the ballot.[327] But removing party endorsements from the ballot is not necessarily a sensible idea. Without party endorsement – however noisy that signal may be – many voters would be clueless as to the identities or qualifications of the candidates. People would vote on the basis of someone's name, gender, or perceived ethnicity [328]

July 7, 2003 at 4 (judges in Queens County are personally selected by the Democratic Party leader). The situation is the same or worse in Brooklyn, where judgeships are allegedly sold by party leaders for cash. *See* text accompanying notes ___, *supra*. Gerald P. Garson, the judge indicted for accepting bribes to fix divorce cases, was a former treasurer of the Brooklyn Democratic organization. *See* Randal C. Archibold, Mayor Wants Panels to Name Some Judges Independently, New York Times, May 29, 2003, p B10.

[324] *See* Clifford J. Levy, Picking Judges: Party Machines, Rubber Stamps, New York Times, July 20, 2003, p. 1, 34.

[325] *See* Clifford J. Levy, Picking Judges: Party Machines, Rubber Stamps, New York Times, July 20, 2003, p. 1, 34.

[326] *See, e.g.*, *Geary v. Renne*, 911 F.2d 224 (7th Cir. 1993) (striking down state prohibition on party endorsements of candidates in nonpartisan elections).

[327] Nonpartisan ballots for judicial elections have been used in some states. *See, e.g.,* Michael R. Dimino, Pay no Attention to that Man behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians, 21 Yale & Policy Review 301, 375 (2003).

[328] To see the possibilities one need only look to the free-for-all that precipitated out of the successful candidate to schedule a recall election for California Governor Grey Davis in the summer of 2003.

The party can at least be held accountable to some extent if the judges it recommends turn out to be stinkers.

Campaign finance reform is also on the table in many states. The idea here is that the imperative to raise campaign funds distracts judges from their proper tasks, opens them to influence, and damages public respect for the judiciary.[329] Some states have imposed limits on contributions to judicial campaigns.[330] Public financing for judicial elections might also address some of these concerns.[331] But campaign finance reform is far from a panacea. If voters are apathetic and uninformed, public funding will not address the underlying problem. Public funding is expensive, doesn't eliminate unaffiliated expenditures, and doesn't deal with incompetent, abusive or venal judges. Perhaps most importantly, it does not address the domination of the process by party leaders and could exacerbate the problem by increasing the pool of money which bosses could siphon off for their own purposes.

Executive Appointment. Executive appointment of judges is not a reform; it is the traditional means by which judges have been selected in the United States. In light of the

[329] A survey conducted for the Texas Supreme Court and the Texas State Bar showed that nearly half of the judges in Texas and a large majority of lawyers and court employees believe that campaign contributions influence judicial decisions. *See* http://www.constitutionproject.org/ci/survey/texas.htm. An American Bar Association poll concluded that 72 percent of Americans nationwide are concerned that the impartiality of judges is compromised by their need to raise campaign contributions. ABA Journal E-report, August 16, 2002, available at http://www.abanet.org/journal/ereport/au16conf.html.

[330] *See, e.g.,* Ala. Code § 12-24-1; Tex. Elec. Code Ann. § 253.155 (imposing restrictions on contributions to judicial candidates or officeholders).

[331] *See* Deborah Goldberg, Public Financing of Judicial Elections: the Roles of Judges and the Rules of Campaign Finance, 64 Ohio State Law Journal 95 (2003); Kathryn Abrams, Some Realism About Electoralism: Rethinking Judicial Campaign Finance, 72 Southern California Law Review 505 (1999); Charles Gardner Geyh, Publicly Financed Judicial Elections: An Overview, 34 Loyola University of Los Angeles Law Review 1467, 1476-78 (2001); Roy A. Schotland, Campaign Finance in Judicial Elections, 34 Loyola University of Los Angeles Law Review 1489, 1505 (2001).

widespread adoption of judicial elections, however, executive appointment now has a place in the list of policy options along with other means for judicial selection.[332]

Executive appointment has the advantage that accountability for bad appointments can be tagged to the president or governor who selects the judge. Procedures for confirmation by a legislative body (in the case of the federal government, the Senate) provide an additional screen against bad quality.

On the other hand, executive appointment has obvious problems. Because judges typically serve for longer terms than the official who nominates them, the check of accountability is diluted by the fact that the nominating official will usually be out of office by the time a judge's inadequacies come to light. Unless the nominating official wants to create a legacy for her administration (a factor that may have some salience in the case of the federal judiciary), quality may be eclipsed by expediency.

The process of legislative confirmation, while it may act as a partial check on quality, also introduces partisan considerations into the appointment process. Centralization of accountability is diluted when a nomination goes to a collective body. If the confirming body is dominated by a different political party than the nominating official, moreover, the confirmation process may be used as an opportunity to embarrass or punish a political adversary. Interest groups can become active around high-profile appointments.[333] If the nominating officer wants to avoid a bruising partisan battle, she may simply nominate a mediocre person with unimpeachable credentials and no "track

[332] *See* Mark A. Behrens & Cary Silverman, The Case for Adopting Appointive Judicial Selection Systems for State Court Judges, 11 Cornell Journal of Law and Public Policy 273, 309-10 (2002); J. David Rowe, Limited Term Merit Appointments: A Proposal to Reform Judicial Selection, 2 Texas Wesleyan Law Review 335 (1995).

[333] It is probable, for example, that both liberal and conservative interest groups profited from the firestorm of controversy surrounding President Reagan's nomination of Robert Bork to the U.S. Supreme Court.

record" of writings or speeches that might be taken out of context and used for political ammunition. Finally, and perhaps most saliently, the executive appointment process appears most effective at weeding out unqualified candidates for appellate courts. Candidates for trial court judgeships do not receive the same attention.[334] Thus, the appointment process may do little to police against bad judges at the trial level where the problem appears principally centered.

Merit Selection. Another approach is to replace political appointments (whether by election or executive nomination) with an ostensibly nonpolitical process in which judges are selected on the basis of merit.[335] Merit selection of judges at the state level has been on the policy agenda for nearly a century, and began to be adopted beginning with Missouri in 1940.[336] The Missouri Plan provides that the appointing authority (usually the governor) picks judges from a list of qualified candidates proposed by aselection committee.[337] The selection committees are typically composed of attorneys, lay members, and judges. Members of the selection committees are usually appointed by the

[334] At the federal level, for example, candidates for District Court positions are vetted for quality with the bar associations and other groups, but the selection process is essentially political. The tradition is that Senators in the President's party pick candidates for district court vacancies in their districts.

[335] For a recent endorsement of merit selection of state court judges, *see* Report of the Task Force on Selecting State Court Judges, in Task Forces of Citizens for Independent Courts, Uncertain Justice: Politics and America's Courts 87-106 (2000).

[336] *See* Maura Ann Schoshinski, Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections, 7 Geo. J. Legal Ethics 839 (1994); Jay A. Daugherty, The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?, 62 Mo. L. Rev. 315, 318 (1997); Elmo B. Hunter, Revisiting the History and Success of Merit Selection in Missouri and Elsewhere, 60 University of Missouri at Kansas City Law Review 69 (1991).

[337] *See, e.g.*, http://www.supreme.state.az.us/jpr/Explanatory%20Documents/overview.htm (merit selection system for judges in Arizona). Merit selection can also be introduced at the municipal or county level. In New York City, for example, family court and criminal court judges are appointed by the mayor. By executive order, the mayor selects only people found to be "highly qualified" by a 19-member mayoral commission as well as by the city bar association. *See* Randal C. Archibold, Mayor Wants Panels to Name Some Judges Independently, New York Times, May 29, 2003, p B10.

governor.[338] Merit selection systems introduce electoral politics into the picture at the stage of retention. Judges are re-evaluated by the commissions at this stage, and then run for retention in a public election.[339] Thereafter, they serve for extended terms prior to another retention election.

Merit selection addresses several important problems. Candidates for judicial office who lack basic knowledge of the law are unlikely to be appointed in merit selection states. Similarly, individuals with reputations for being intemperate or abusive may be weeded out during the vetting process that accompanies merit selection. Judicial candidates who have poor ethics might also be identified and excluded. Most importantly, if a merit selection process works well, the influence of political insiders may be reduced.

Although it offers significant benefits over overtly political selection, merit selection is not a panacea for the bad judges problem. Under existing merit selection programs, the vetting process takes place most intensively at the stage of initial appointment, where judicial candidates may be able to disguise their deficiencies. Once appointed, they can manifest bad qualities with only minimal concern that they will be ousted. Vetting of sitting judges tends to be less intensive than the initial investigation. The judge must run for retention, but the outcome is usually preordained because there is no opposing candidate.[340] At this stage there is no rival who has a strong incentive to

[338] See American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (April 2002); The Counsel of State Governments, The Book of the States 137-39 (2000) (39 states select at least some of their judges by elections).

[339] This is favored in Max Boot, Out of Order: Arrogance, Corruption and Incompetence on the Bench (1999).

[340] Even in Illinois, a state where most judges are elected rather than appointed, retention elections are rarely contested. *See* Marlene Arnold Nicholson and Norman Nicholson, Funding Judicial Campaigns in Illinois, 77 Judicature 294 (1994) (finding that losses in retention campaigns were quite unusual prior to 1988 and remained uncommon thereafter).

bring the candidate's deficiencies to light, both because the public would probably not pay attention and because the rival would not necessarily be appointed if the judge lost her bid for retention.

Although sometimes touted as a means for limiting the influence of interest groups in judicial elections,[341] merit selection can be captured by special interests.[342] Service on selection panels is a low visibility activity. Interest groups can influence the appointing authority to pick their members for the selection committee. The committee, in turn, may select judges not on intrinsic merit, but rather out of a wish to accommodate the demands of competing interests within its ranks. Even if interest groups do not control appointments, moreover, the governor may select members of selection panels for political reasons. The merit of judicial candidates is only as good as the quality of the persons serving on the selection committee. Patronage and backroom deals are possible in merit selection systems.

Finally, merit selection sacrifices some degree of accountability. If judges are selected by people who are not themselves accountable to the electorate, the democratic check on appointments is diluted. Retention elections are not an effective bow to democratic principles given that they generate a vote in favor of retention in the vast majority of cases. Perhaps because of their non-democratic features, merit selection plans encounter surprising public resistance. Despite widespread perceptions that elected judges are less independent, judicial election of judges continues to be popular.[343]

[341] *See* Anthony Champagne, Interest Groups and Judicial Elections, 34 Loyola University of Los Angeles Law Review 1391 (2001).

[342] *See* David Barnhizer, 'On the Make': Campaign Funding and the Corrupting of the American Judiciary, 50 Catholic Law Review 361, 423 (2001).

[343] *See* Ronald D. Rotunda, A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates, Professional Lawyer (Winter 2003).

Publicity. Another possible systematic reform for dealing with bad judges is to increase public disclosure about judges. Such disclosure could take a number of forms.

One option would be to disclose more information about disciplinary actions against judges. Such information could be used in elections and could also provide a deterrent to judges who do not want their peccadilloes brought to light. As noted above, however,[344] increasing the information available about the activities of judicial disciplinary panels is a two-edged sword. It would certainly increase public accountability and knowledge about judges. On the other hand, the public may give too much weight to minor infractions, especially in systems with elected judges where opponents may attempt to take any sort of discipline out of context and turn it into a campaign issue. If all disciplinary measures were publicized, the disciplinary panels would lose an important gradation in their ability to design punishments suitable for the offense. Publicity may also increase the adversarialness of proceedings and may induce judges to be less cooperative with committee investigations. Further, if all sanctions for even minor offenses were reported, the public might overestimate the frequency and seriousness of judicial misconduct, eroding public respect for the law and the legal system. Accordingly, while it makes sense to publish the names of judges who receive a serious sanction, there may be a sound rationale for maintaining the confidentiality of minor sanctions.

Another option for dealing with bad judges would be to publicize their administrative performance. In the federal system, for example, each judicial district must publish biannually a list of judges and the matters pending before them during a

[344] See text accompanying notes __ - __ *supra*.

specified period of time.[345] This requirement may shame some judges into speeding up their work. But it is relatively minor punishment because few people other than fellow judges will care about the information. Further, a judge's backlog is not a reliable indication of quality. A judge whose principal concern is to clear cases off her desk may have an excellent record for timeliness but still be a bad judge because she does not give sufficient attention to decisions. Conversely a judge who has a longer than-usual backlog may be someone who is scrupulous to make the right decision and to allow litigants full opportunities to present their cases. Or the apparently dilatory judge may simply have large or complex cases on her docket.

A third option would be to provide general quality ratings of particular judges. Several states have instituted official systems of performance rating for judges. Arizona's is exemplary. A 1992 amendment to the state constitution instructed the Supreme Court to institute a system for evaluating judicial performance and to report the results prior to a judge's retention election.[346] The Supreme Court appointed a Commission on Judicial Performance Review, composed of thirty individuals, the majority of whom may not be lawyers or judges.[347] The commission evaluates whether judges meet performance standards related to legal ability, integrity, communication skills, judicial temperament, administrative performance, and settlement activities. The commission investigates performance through surveys and other means of obtaining information from persons who have contact with judges, including litigants, witnesses,

345 Civil Justice Reform Act, 28 U.S.C. § 476. *See* R. Lawrence Dessem, Judicial Reporting Under the Civil Reform Act: Look, Mom, No Cases!, 54 University of Pittsburgh Law Review 687 (1993).

346 See Arizona Constitution, Article 6, § 42.

347 See http://www.supreme.state.az.us/jpr/Explanatory%20Documents/overview.htm.

jurors, court staff, attorneys, and other judges.[348] The results of these investigations are distributed to the public prior to each election in a voter information guide. The commission also conducts mid-term self-evaluation reviews of judges who are not slated for retention elections; these are for the judge's own use and are not made public.[349] In both the retention and mid-term evaluations, the judges themselves fill out survey forms and meet with a delegation of the committee to develop self-improvement plans.

Information about judicial quality can also be obtained from private sources. All judges have a reputation among lawyers and fellow judges that ranks them along dimensions such as skill, integrity, intelligence and fair-mindedness. Newspapers and bar journals sometimes run stories in which quality of judges is assessed. For judges who value their reputations as scholars or crusaders, law review commentary can be influential. In some jurisdictions, trial lawyers give public ratings to judges.[350]

Public and private quality ratings offer some degree of help on the bad judges problem, but they suffer from several shortcomings. Merely knowing that a particular judge has a reputation for quality (or lack of quality) provides little useful information to parties. They still have to litigate their case. Perhaps knowing that a judge has a bad temper might cause a lawyer to modulate the vehemence with which she objects to particular rulings, but overall, knowing that one is before a bad judge does little to cure the problem.

Quality ratings do offer some value in the process of selection and retention, but even here their utility can be questioned. In jurisdictions with elected judges, quality

348 *See* http://www.supreme.state.az.us/jpr/Explanatory%20Documents/overview.htm.

349 *See* http://www.supreme.state.az.us/jpr/Explanatory%20Documents/overview.htm.

350 *See, e.g.,* Robynn Tysver, Omaha Judge Reprimanded For Mistreating Defendants, Omaha World-Herald, September 30, 2000, available at 2000 WL 4374792 (Nebraska). In New York, a publication called

ratings may have some effect in extreme cases, but even bad ratings are unlikely to prevent many judges from being elected. Most voters care little about judicial elections,[351] which typically offer the level of excitement of a PBS special on tooth decay.[352] Voters are unlikely to pay attention to quality ratings unless the judge's misconduct is salacious or extreme. Even with the more permissive attitude recently displayed among the courts towards judicial campaign speech,[353] it is unlikely that judicial elections will spark public interest. Proposals for improving the quality of information available to the public thus run into the problem of voter apathy.

Quality ratings could have more of an influence in merit selection states, where judicial selection panels might find such information useful in selecting candidates. The problem here is that if the candidate has not previously served as a judge, there will be no quality ratings available for that person. When quality ratings are available, the judge is usually running in an unopposed retention election where the chance of ouster is low even if the judge turns out to be unqualified.

A final problem with quality ratings is that they depend on potentially biased or incomplete data. Survey data, for example, can be instructive but must reflect a sufficiently large and unbiased sample of the population to convey reliable information. Much also depends on the questions asked. Moreover, survey data is not bonded by

"New York Judge Reviews" is available in which practicing lawyers critique judges before whom they appear. Douglas Feiden, Trial and Error in Queens Courts, New York Daily News, July 7, 2003, at 5.

[351] *See* David Barnhizer, 'On the Make': Campaign Funding the Corrupting of the American Judiciary, 50 Catholic University Law Review 361, 364 (2001) (judicial elections typically spark little interest in the electorate).

[352] *See, e.g.*, Michael R. Dimino, Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians, 21 Yale Law & Policy Review 301, 374 (2003) (judicial campaigns tend to be "docile" and "gentlemanly"); Anthony Champagne, Interest Groups and Judicial Elections, 34 Loyola University of Los Angeles Law Review 1391, 1393 (2001) (judicial elections are "boring" and "minimally useful").

[353] *See* text accompanying notes ___ *supra*.

people's actual behavior. People only have to check boxes in a form. Presumably, a more reliable marker of quality would be people's actual behavior with respect to a particular judge: do litigants seek to avoid a judge or rather affirmatively seek her out? Such information is not currently available in judicial quality surveys.

Educational Programs. Another approach to the bad judges problem would be a system of training for jurists.[354] Educational programs may be particularly useful in the case of lower-level judicial officers such as magistrates or justices of the peace, who sometimes are not attorneys and may not even hold a college degree.[355] There are, in fact, many programs available to judges offering continuing education in matters relevant to the judicial function. These include programs offered by the Federal Bar Association, the American Bar Association, universities,[356] think tanks and private entities with a wide range of views and ideologies.[357]

However, educational programs for judges provide at most a partial fix for the bad judges problem. There is usually no requirement that judges undergo any educational preparation for their elevation to the bench.[358] Unlike certain foreign countries, in which

354 *See* Luke Bierman, Beyond Merit Selection, 29 Fordham Urban Law Journal 851 (2002) (recommending required educational credentialing for judges).

355 *See* Brendan Smith, Some Judges Run Afoul of the Law, Albuquerque Journal, February 10, 2002, available at 2002 WL 12685479 (Arizona magistrates and municipal judges need only a high school diploma).

356 The Institute for Judicial Administration at my own institution, New York University Law School, is a leading example.

357 *See* Thomas M. Nickel, Judges Deserve Access to Educational Opportunities, 49 Federal Lawyer 56, 57-58 (2002) (cataloging educational opportunities for judges). Some, notably former judge Abner Mikva, complain that these seminars are a plot by conservatives to lure judges into indoctrination sessions at luxurious boondoggles. *See* Abner Mikva, Judges, Junkets, and Seminars, Litigation, Summer 2002 (complaining that "private interests" are "allowed to wine and dine judges at fancy resorts under the pretext of 'educating' them"). Senators Feingold and Kerry introduced legislation in 2000 that would have reined in such activities. See Judicial Education Reform Act of 2000, S. 2990 (106th Cong.) (Kerry-Feingold bill). For discussion of the overall issue, *see* Bruce Green, May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions Of Judicial Ethics and Policy, 29 Fordham Urban Law Journal 941 (2002).

358 *See* Marc T. Amy, Judiciary School: A Proposal For a Pre-Judicial LLM Degree, 52 Journal of Legal Education 130 (2002) (calling for formal educational requirements for judges).

service on the judiciary is viewed as a career path involving extensive educational preparation and possibly an internship with a judge,[359] American judges face only minimal prerequisites for service. Judges are encouraged or required to enroll in continuing education courses,[360] but the requirements tend to be light and can be satisfied by a wide range of seminars of the judge's choosing. Most judges obtain their continuing education on the bench. Ironically, the judges who voluntarily sign up for seminars are likely to be the ones who need them the least: only judges who are intellectually inclined are likely to consider it a pleasure to spend a week mooting legal doctrines with professors. Judges who truly need the educational booster shot will not get it.

Most fundamentally, education alone cannot solve many of the problems of bad judges. Even brilliant judges behave badly. Consider former New York State Chief Justice Sol Wachtler, widely viewed as an outstanding intellect and a superbly qualified jurist.[361] Few judges were less in need of continuing education than Judge Wachtler. Yet when a romance with a New York socialite went awry, Wachtler commenced a disastrous

[359] In France, for example, judges are selected by a competitive examination, attend a specialized school, and serve as the equivalent of government civil service officers. *See* John Bell, Principles and Methods of Judicial Selection in France, 61 Southern California Law Review 1757, 1758 (1988). In Germany, prospective judges must pass two rigorous examinations and must serve a practicum with a judge. *See* David S. Clark, The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat, 61 Southern California Law Review 1795, 1802- 04 (1988). Similarly, in Japan, prospective judges must graduate from a law department of a University, pass a national examination, serve two years of training at a national institute, and then serve as an assistant judge before being promoted as a judge with a full ten-year term. *See* Takaaki Hattori, The Role of the Supreme Court of Japan in the Field of Judicial Administration, 60 Washington Law Review 69, 72-81 (1984).

[360] In some states, continuing education for judges is only recommended. *See, e.g.,* California State Rules of Judicial Administration, Appellate Division I, Standard 25.1(a) ("Judicial officers should consider participation in judicial education activities to be an official judicial duty. The responsibility for planning, conducting, and overseeing judicial education properly rests in the judiciary."). Other states require it, either for non-attorney judges, *see, e.g.*, Indiana Rules for Admission to the Bar & Discipline of Attorneys, Rule 29 (requiring CLE for city and town judges who are not licensed as attorneys), or for judges generally, *see, e.g.,* Colorado Rule of Civil Procedure 260.2 (requiring all state judges to complete 45 units of CLE during each three-year period).

[361] *See generally*, Linda Wolfe, Double Life: The Shattering Affair Between Chief Judge Sol Wachtler and Socialite Joy Silverman (1997); Laurie Goodstein, Trail of N.Y. Socialite's Tormentor Led Tragically Close to Home, Washington Post, November 15, 1992.

course of conduct including extortion, stalking, and kidnapping threats – resulting in a fall from grace worthy of a Shakespearian tragedy. While intensive psychotherapy might have prevented Wachtler's collapse, no amount of continuing judicial education would have done the job.

C. Remedies Relying on Private Action

Forum Selection. We turn now to remedies relying on private action. One obvious avenue available to litigants is the option to avoid an undesirable jurist by choice of forum. A plaintiff can generally bring suit in the court of her choice so long as requirements of personal jurisdiction and venue are satisfied. Thus, if a plaintiff fears encountering a bad judge in one forum, she can usually go elsewhere. Defendants have fewer options, but even they can exercise a substantial degree of forum choice. If they do not like a particular judge, they can move to transfer the case because of lack of venue or on grounds of *forum non conveniens*. If the suit is brought in state court, the defendant may be able to remove it to federal court. Defendants may even enjoy one advantage as compared with plaintiffs, in that they will often know the identity of the judge assigned to their case at the time they face the decision about whether to seek a change of forum.

Forum choice is not a satisfactory answer to the problem of bad judges, however. To avoid a particular judge, a plaintiff may have to abandon an entire jurisdiction in which many highly qualified judges also serve. Forum choice can also be costly since the parties may wind up litigating in an inconvenient court. The grounds for forum choice, moreover, are only accidentally correlated with the quality of the judge. Removal is solely jurisdictional:it will not lie to correct even overt bias or prejudice on the part of

the state judge if grounds for removal are not otherwise present.[362] Moreover, the power of forum choice may exacerbate rather than ameliorate the bad judges problem. Suppose that a plaintiff's attorney happens to have an inappropriately close relationship with the only judge in a particular court. The plaintiff can then use the power of forum choice to select a judge biased in her favor. Here, forum selection makes matters worse.

Peremptory Challenges. Several states allow litigants to peremptorily challenge judges.[363] In some, the challenge must be accompanied by a lawyer's affidavit asserting that a fair and impartial trial cannot be obtained.[364] Other states do not require an allegation of cause.[365] In all states with peremptory judicial challenges, pleadings and motions facially conforming to the requirements of the rules are sufficient to require immediate replacement of the judge for all future merit-based adjudications,[366] at least so long as a party opposing the challenge cannot establish that it is made in bad faith or for purposes of delay.[367]

[362] *See, e.g.*, *Kennedy v. State*, 373 F.Supp. 519 (E.D. Wis. 1974) (remanding case which had been removed from state court by a criminal defendant who claimed that the state trial judge was racially prejudiced and biased in favor of the prosecution).

[363] Alaska Statutes § 22.20.022, Alaska R.Civ. P. 42(c); Alaska R. Crim. P. 25(d); Arizona.R. Civ. P. 42(f); Ariz.R. Crim. P. 10.2; California Code of Civil Procedure § 170.6; Missouri Rule of Civil Procedure 51.05; Mont. Sup. Ct. R. 34; New Mexico R.Civ. Pro. 1-088.1; New Mexico R. Crim. Pro. 5-106; Nevada Sup. Ct. R. 48.1; Oregon Statutes § 14.260; Wisconsin Statutes Ann. § 971.20 (applying to criminal cases only); Wyoming Rule of Civil Procedure 40.1(b). Some states permit peremptory challenges to judges designated by special appointment, such as visiting judges, but do not extend the privilege to the trial courts generally. See, e.g., Texas Government Code § 74.053. Peremptory challenge procedures have been proposed for the federal courts, but have never been adopted. *See* S. 1886, 92nd Cong. 1st. Sess. § 3 (1971).

[364] *See, e.g.*, Alaska Statutes § 22.20.02. The affidavit requirement was a response to constitutional objections to peremptory judicial challenges based on state separation of powers principles. *See, e.g.*, *Johnson v. Goldman*, 94 Nev. 6, 575 P.2d 929, 930 (1978) (striking down Nevada's peremptory challenge statute on state separation of powers grounds).

[365] *See, e.g.,* Wisconsin Statutes Ann. § 971.20; Missouri Rule of Civil Procedure 51.05; New Mexico R.Civ. Pro. 1-088.1. These procedures may be upheld against constitutional challenge, either because they are found not to intrude on the judicial province, *see State v. Holmes*, 106 Wis. 2d 31, 3154 N.W.2d 703 (1982), or because they are adopted by the judicial branch itself – as in the case of procedures embodied in rules of court.

[366] *See, e.g., State ex rel. Walters v. Schaeperkoetter,* 22 S.W.3d 740 (Mo. App. 2000) (upon proper filing of challenge, judge's only remaining jurisdiction was to grant the application and transfer the case).

[367] *See, e.g.,* Oregon Rev. Stat. § 14.260 (peremptory challenge of judge must be allowed unless "the judge moved against, or the presiding judge in those counties where there is one, challenges the good faith

Peremptory judicial challenges balance fairness to the parties against interests in preserving judicial efficiency and preventing "judge-shopping." The latter two concerns dictate that, in general, each party gets only one challenge – otherwise parties could continuously challenge judges, thus imposing costs on their adversaries and the judicial system and preventing adjudications on the merits.[368] For similar reasons, peremptory judicial challenges must be made within a relatively short time after the identity of the judge is known to the party making the challenge.[369]

Problems can arise when multiple parties are involved. In such cases, the peremptory challenge rule needs to be administered with sensitivity to fairness to the parties while at the same time avoiding the inefficiencies and potential strategic advantages that could be created if multiple parties on the same side were allowed to exercise separate challenges. Courts generally address the problem of multiple parties by allowing parties who are aligned in interest only one peremptory challenge between them,[370] or giving judges discretion to determine a fair number of challenges when the parties cannot agree.[371] Other problems arise when parties who would be entitled to

of the affiant and sets forth the basis of such challenge. . . . The burden of proof shall be on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.")

[368] The rule providing a party with one and only one peremptory challenge may be tested when the court has to decide whether a given proceeding is the same or different from an earlier proceeding in which a challenge was exercised. *See Staso v. State Department of Transportation* , 895 P.2d 988 (Alaska 1995) (allowing party to exercise second peremptory challenge of judge after dismissal of earlier identical case, but noting that courts can impose sanctions on parties for bad-faith dismissals); *Crain v. Missouri Pacific R.R.* 640 S.W.2d 533 (Mo. App.1982) (allowing second peremptory challenge even though challenge had already been exercised in a case between the same parties and matter had same caption and case number, because court held that the second controversy was an independent civil action).

[369] If, however, a party has succeeded in obtaining a reversal of a trial court's ruling, some states provide for second peremptory challenge on remand, perhaps out of concern that the trial judge not be permitted to penalize the winning party for taking the appeal. *See, e.g.*, Wisconsin Statutes Ann. § 971.20(7).

[370] Missouri's rule, for example, allows only one peremptory challenge to five categories of litigants, regardless of how many parties may be in each category: plaintiffs, defendants, third party plaintiffs, third party defendants, and intervenors. Mo. R.C.P. 51.05(d).

[371] *See, e.g.*, Alaska Criminal Rule 25(d): "When multiple defendants are unable to agree upon the judge to hear the case, the trial judge may, in the interest of justice, give them more than one change as a

peremptory challenges are added late in the litigation; here the courts generally allow the challenges to go forward.[372]

Peremptory challenges of judges are a constructive reform with considerable efficacy as a means for excluding a judge while alleviating some of the onus associated with having to allege that a judge is unable to provide a fair trial.[373] All states should give serious consideration to the procedure. However, as currently structured, peremptory challenge procedures do not go far enough.

For one thing, peremptory challenges are allowed only after a judge has been assigned to the case. Because of this fact, the judge will know that she has been challenged as biased, and also will know the identity of the lawyer making the charge. Indeed, the peremptory challenge must be directed to the very judge whose integrity is being questioned. This process places the trial judge in the unsatisfactory position of being confronted with a serious accusation going to her fitness to serve without the least opportunity to defend herself. While it may be argued that the judge does not need to defend herself since the challenge must be granted as a matter of right, it would be natural for a judge to feel insulted and frustrated at being required to grant relief to a party who has made what the judge considers to be an unwarranted slight to her integrity. Related to this concern is the fact that the judge will know the identity of the challenger. Some states provide thata party exercising the right to a peremptory challenge cannot be

matter of right; the prosecutor shall be entitled to the same number of changes as all the defendants combined."

372 *See Home Insurance Company v. Superior Court*, 124 Cal.Rptr.2d 314 (Cal. App. 2002), review granted (allowing the challenges to go forward even if the party making the challenge is joined at a late stage in the action); *Stephens v. Superior Court,* 116 Cal.Rptr.2d 616 (Cal. App. 2002) (late-joined party may exercise a peremptory challenge up to the point at which the trial has commenced or the judge has decided a contested issue of fact).

373 Robert A. Levinson, Peremptory Challenges of Judges in the Alaska Courts, 6 Alaska Law Review 269, 272-73 (1977).

punished by contempt for doing so, or that if a judge's ruling is reversed on appeal, the appellant has the right to challenge the trial judge on remand.[374] But these rules do not address the problem of retribution against attorneys. While litigants may never appear in the judge's courtroom again, the lawyer probably will, and judges have long memories. The judge might bide her time and then take out her frustration on an attorney in another case. And it is, of course, exactly the bad judges who are most likely to exact this kind of payback. Attorneys, knowing this risk, may be less inclined to exercise their client's peremptory challenge in order to stay on good terms with the judge.

Peremptory challenges of judges create particular difficulties in states that require the attorney to make a sworn allegation that the judge cannot provide a fair trial. This requirement exacerbates the problem of insult to the judge and potential retribution against the attorney. Beyond this, the obligation to make an allegation under oath creates tensions with the attorney's role as advocate for the client. Suppose that a plaintiff's attorney considers the judge to be incompetent but not unfair. In light of the complexity of the issues, the attorney believes that the judge is unlikely to understand the theory of the case. The client would be much better off with a different judge. Or suppose the attorney believes that the judge has strong ideological views unfavorable to the client's case, such that the judge is likely, given a matter of first impression, to rule for the adversary. On the other hand, the attorney also believes that the judge is willing to apply the law to the facts once the law has been decided. Can the attorney make the required attestation in these cases? Presumably not because the attorney does not have adequate grounds to believe the judge is incapable of providing a fair trial. But the attorney's duty

[374] *See* text accompanying notes __ - __ *supra.*

of vigorous advocacy on behalf of the client, coupled with the fact that the veracity of the attorney's affidavit cannot be questioned, might encourage the attorney to do so.

Finally, data on peremptory challenges of judges have not been used to aid in retention, supervision or re-election. The frequency of peremptory challenges would appear to provide useful information about a judge's reputation for fair-mindedness and integrity. However, these statistics do not appear to be maintained or distributed.

III. The Panel Exclusion Approach

Having surveyed the landscape of existing approaches to the bad judges problem, we can now assess the panel exclusion idea. This idea has two parts. First, the court administrator would select at random panels of three or five trial judges for any given case. The names of these judges would be given to the parties but the judges themselves would be shielded from knowledge that they are on any particular panel. Each party would then have the unqualified right at the outset of a case to exclude one judge (in the case of a three judge panel) or two judges (in the case of a five judge panel). Exercises of this exclusion right would be kept confidential and not shared either with the opposing party or with the judges on the panels. After the parties have exercised their exclusion rights (or refrained from exercising them), the court administrator would select a trial judge from those remaining on the panel. As the idea is constructed, there would never be fewer than one judge remaining on the panel even if all exclusion rights were exercised. The trial judge who is selected would then handle the litigation in the ordinary course.[375]

[375] This idea is similar to procedures common used to select labor arbitrators. *See, e.g.*, American Arbitration Association, Labor Arbitration Rule 12, available at http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\labor\laborarbrules.html#12 (providing that if the parties have not designated a

The panel exclusion idea would need to be implemented in such a way as to account for several of the issues that have arisen in connection with peremptory challenges of judges. For example, it would be necessary for exclusion rights to be exercised by a specified time early in the proceeding. Unlike the peremptory challenge model, the early exercise of exclusion rights would tend to be self-regulating in the panel exclusion idea since the case cannot progress unless a judge has been assigned, and the judge would not be assigned until the parties had exercised their exclusions. The system would also have to account for issues of multiple parties. When only a plaintiff and a defendant are involved, its administration would be straightforward, but when third party defendants, intervening plaintiffs, or additional defendants with conflicting interests are joined, the matter becomes more complicated. However, these issues have been handled satisfactorily in states with peremptory judicial challenges, and there is no reason they could not also be dealt with efficiently under the panel exclusion idea.

The second part of the panel exclusion idea is that the court administrator would compile information about exclusion rates and make this information public in connection with selection, retention, or removal. The idea here is that the decision to exclude a judge will be made (in the usual case) by attorneys who have good information about the quality of the judges under consideration. Because attorneys are repeat players in jurisdictions in which they practice, they will often have personal experience with the judges selected for the panel, and thus have a good basis on which to make the exclusion

method for selecting arbitrators, the arbitration association provides a list of potential arbitrators to the parties, who thereafter have the right to strike names of persons they do not want to hear the case); Federal Mediation and Conciliation Service Rule 1404.12(c)(1), available at http://www.fmcs.gov/internet/itemDetail.asp?categoryID=197&itemID=16959 (providing that where collective bargaining agreement is silent on method of selecting arbitrators, arbitrator may be selected from panel by each party striking a name until one remains).

decision. Even if an attorney has slight or no personal experience with a judge, she will often have partners or associates who have experience with the judge. And attorneys have opportunities to obtain information about judges through informal contacts with other attorneys. Moreover, the panel exclusion idea, if implemented, would provide additional incentives for attorneys to become informed about judges because they will know that they are likely to be faced with exclusion decisions in the future. Because the exclusion decision is likely to be made by a well-informed party, it provides potentially reliable information about the quality of the judges under consideration. The quality of the information would be further enhanced by the compilation of numerous exclusion decisions into an overall statistic thatwould tend to correct for mistakes in individual cases.

Exclusion rates could be used in a number of different ways. For example, if judges are slated for retention elections under a merit selection process, the exclusion rates of the candidates could be distributed to the public along with some key for evaluating a candidate's performance relative to her colleagues. The same could be done if a judge runs for re-election. One might imagine an even more potent use of these statistics: a jurisdiction could provide that a judge would be disqualified from running for re-election or retention if her exclusion rates exceeded some high threshold. Data on exclusion rates could be useful even if a judge does not stand for election. High rates of exclusion provide feedback to a judge, or to persons charged with supervising the judge, that there is something amiss in her conduct. Even in the federal system with life tenure for judges, exclusion rates could be helpful at identifying problems and providing judges with an incentive to correct their deficiencies. These data could also be useful in the case

of promotions in the federal system: if a district court judge is a candidate for nomination to an appellate position, his or her record of exclusion would presumably be something that the president and the senate would take into account.

The panel exclusion idea would address most of the problems with bad judges identified earlier in this paper. Judges who are corrupt, venal, biased, incompetent, neglectful, whimsical, partisan, arbitrary, abusive, or conflicted would face exclusion under this reform. The panel exclusion concept would cover a wider range of misconduct than even the peremptory challenge procedure, which is (in theory) limited to cases in which the judge's bias renders her unlikely to provide a fair and impartial forum.[376] Indeed, the idea would cover judicial qualities which do not fall into any category of misconduct. Parties would have the opportunity to select for desirable qualities such as excellence in legal analysis or superior judicial temperament.

The panel exclusion idea offers other benefits. Because judges would not be aware that they are assigned to panels and because exclusions would be implemented by court administrators, judges would not face the unsatisfactory necessity, which they experience in peremptory challenge jurisdictions, of having to approve a motion that is based on an insult to their very fitness for office. For the same reason, lawyers and litigants who exercise their exclusion rights have no reason to fear retribution from the judge. Judges would not know the identities of people who excluded them. Even if a judge found out, she would not have a good reason to take offense. Because exclusion decisions could be made for any reason or no reason at all, there would be no insult to the judge from the fact of being excluded. Indeed, parties would often exercise their

exclusion rights for the same reason that parties exercise peremptory challenges to jurors in criminal trials: if there is even a slight reason to prefer one judge over another, the party would have an incentive to exclude the less preferred judge. Being excluded in a given case would not necessarily represent a negative assessment about the judge's fitness for office.

The panel exclusion idea would appear to represent a constructive approach to the tension between accountability, independence and quality in the selection and supervision of American judges. Decisions by private litigants to exclude judges from panels do not threaten the autonomy or integrity of the judicial branch. At the same time, the panel selection idea creates significant opportunities for holding judges accountable to the very parties – litigants and lawyers – who have the most at stake. Judges who do not act in ways that are acceptable to these constituents will be excluded. The accountability achieved by the panel exclusion idea would be particularly valuable in jurisdictions with appointed judges, since it would permit litigants to vote with their feet. The idea also mitigates the potential adverse effects of achieving accountability through electoral selection of judges. The "majoritarian difficulty"[377] of elected judges is controlled, to some extent, if litigants have the right to exclude judges whose integrity may be compromised by political obligations.

The panel selection idea would not increase public suspicion of judges or undermine the rule of law. It is true that exclusion rates would be made public, or at least made available to persons with authority for selecting candidates for retention or re-

[376] The panel exclusion process would not, however, deal with all cases of bad judges: personal misconduct outside the bench, for example, might not be regulated even when the judge's peccadilloes reflect adversely on her fitness for office.

election. The public would have access to information that judges were excluded from sitting on cases. This information, however, would not necessarily evoke concern. If the public understood that exclusions could be made for any reason or no reason at all, they would see that even a relatively high exclusion rate would not impeach the judiciary's competence or integrity. At the same time, public trust in the judiciary and the rule of law would likely be increased to the extent that people perceived that they have the power to reject trial judges whose integrity or impartiality they distrust. Moreover, if the panel exclusion idea is effective, the result would be to weed out bad judges, eventually enhancing judicialquality and, concomitantly , increasing public respect for the judiciary and the rule of law.

The panel exclusion idea would take some of the pressure off other methods for controlling bad judges. For example, if a party distrusts the fairness of a trial judge, she could simply exclude the judge from the panel. It would not be necessary for the party move to recuse the judge, which as already noted is both risky for the moving party and potentially damaging to the reputation of the judiciary.[378] Similarly, panel exclusions would take some of the pressure off judicial disciplinary commissions: many potential instances of judicial misconduct could be averted by exclusion, and the process of exclusion itself together with publication of exclusion rates could deter misconduct which would otherwise fall within the responsibility of these commissions.

The panel exclusion idea would appear relatively easy to implement. It would be necessary for the court administrator to come up with the requisite number of judges for

[377] *See* Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 University of Chicago Law Review 689 (1995).

[378] Recusal should still be available, however, if the judge selected after the panel exclusion process turns out to be biased or prejudiced.

the panels – a requirement that might pose problems in states with rural populations. Judges might be required to hear cases as visitors in other courtrooms. The experience of California and other states using peremptory challenges of judges, however, indicates that this staffing problem would not be overwhelming. In other respects the panel exclusion idea appears more efficient than many other approaches for controlling bad judges. Parties would not be required to seek out inconvenient forums. Protracted and costly hearings would not be needed to establish whether or not the judge was biased or otherwise engaged in misconduct. The panel exclusion idea even offers cost advantages as compared with peremptory challenges of judges, which is in itself an inexpensive procedure: because judges would be excluded at the very outset, judges would not have the opportunity to issue even preliminary rulings before being excluded (other than on emergency motions such as temporary restraining orders). The chief judge or court administrator would not have to make *seriatim* appointments, and there would be no grounds for objection to exclusion on the ground that it was made in bad faith or for purposes of delay.

In objection to the panel exclusion idea, it could be argued that challenges to judges should only be used to protect against the danger of biased tribunals, and should not be employed as a means "to obtain strategic advantage by forum shopping for an ideal judge."[379] But the idea would not involve "judge-shopping." It may be inappropriate for parties to take strategic advantage of a procedure devised for other reasons in order to obtain a benefit unanticipated by the framers of the procedure in question. This is not the panel exclusion idea, which is specifically designed to allow

[379] *Moore v. State*, 895 P.2d 507 (Alaska App. 1995).

parties to exercise exclusion rights for any reason or no reason at all. Excluding judges under this process is no more "judge shopping" than exercising peremptory challenges of jurors is "jury shopping." It is true, of course, that the essence of the idea is to allow parties some say in the selection of the judges who will hear their cases; but to denigrate this as "judge shopping" is to substitute invective for analysis.

Another objection to the panel exclusion idea is that its effect would be to create a regression of judges towards a neutral but unimaginative mean. Crusading or creative judges might not be selected. It might be argued that innovative or opinionated judges add a desirable leaven to the flatbread of ordinary law, or that even if their creativity is problematic, their brillianceand energy more than compensate for their shortcomings. However, the panel exclusion idea would not rule out brilliant or imaginative jurists. Complex cases often demand untried approaches; and it is frequently in the interests of all parties that the judge keep an open mind as to how a case might be litigated or a remedy devised. As to a crusading interest in a particular matter, the answer is that such judges are not good judges if they allow personal views to infect decisions, even if we agree with their philosophy on the merits. At least at the trial level, the judge ought to oversee a process in which the facts are found in an impartial and fair manner and the law is applied as set forth by the legislature or interpreted by the courts. The panel exclusion idea would tend to select for this kind of judge.

Conclusion

This paper has explored the problem of bad judges in America's courts. The article identified types of judicial misconduct and provided examples of each. It

examined existing approaches to the issue, each of which in different ways seeks to balance the values of independence, accountability and quality.

The paper then proposed a new approach. Under the panel exclusion idea, the court administrator would randomly select a panel of judges and present the names to the litigants. The litigants would be allowed to exclude judges in such a way that at least one judge would be left at the end of the process. Parties would not be required to provide any reason for striking a potential judge, and judges would not know they have been excluded. Exclusion rates would be complied and used in the process of retention, re-election and supervision. The article argued that the panel exclusion idea has merit when combined with existing approaches and that it offers advantages over currently available options.